Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-36–05 OF 2015(W), 01(i)-52–10 OF 2015(W) AND 01(f)-53–10 OF 2015(W)
AHMAD MAAROP CJ (MALAYA), SURIYADI, ZAINUN ALI, AZAHAR MOHAMED AND ZAHARAH IBRAHIM FCJJ
6 NOVEMBER 2017

Civil Law Act — Application — Whether s 7 allowed exemplary damages to be awarded for arbitrary, oppressive or unconstitutional acts of tortfeasor — Whether s 7 allowed dependant's claim for pain and suffering — Whether exemplary damages recoverable in an estate claim under s 8(2) — Whether exemplary damages could be awarded for breach of fundamental guarantees under Federal Constitution — Civil Law Act 1956 ss 7 & 8 — Federal Constitution

This judgment involves three civil appeals, which arose from three different cases in the High Court. However, because of the similarities of the facts and issues in the three appeals from the Court of Appeal they were heard together by this court. In the first of these appeals ('Appeal No 36'), the respondents were the three children of one Abdul Jaafar bin Abd Mutalib ('Jaafar'), who died in the course of a shooting incident between a police team and Jaafar and three others. The respondents claimed damages for loss of dependency, and for exemplary and aggravated damages. The High Court found that the police team was acting in self-defence when they opened fire after Jaafar and the three others had shot at them. As such, the High Court dismissed the respondents' claim with costs. On appeal, the Court of Appeal found that the appellants had not discharged their burden of proving self-defence and thus allowed the appeal. The Court of Appeal then awarded damages in the sum of RM51,000 for the respondents' dependency claim and exemplary damages in the sum of RM300,000. In the second appeal ('Appeal No 52'), the respondent was the mother, dependant and administratrix of the estate of one Kugan a/l Ananthan ('Kugan'), who died whilst in police custody. The post mortem conducted disclosed that Kugan had died of acute renal failure after being tortured and beaten to death whilst in the custody of the police. The respondent claimed under ss 7 and 8 of the Act for loss of support. She also claimed damages for misfeasance in public office, assault and battery, and false imprisonment and for aggravated damages, exemplary damages, vindicatory damages and special damages. The High Court allowed the respondent's claim and awarded a total of RM801,700 as damages including the sum of RM100,000 for misfeasance in public office and the sum of RM300,000 as exemplary damages. The

A appellants appealed against that decision to the Court of Appeal. The Court of Appeal allowed the appeal by the appellants in part and ordered that the award for false imprisonment be set aside; but it affirmed the rest of the award. In the third appeal ('Appeal No 53'), the respondent was the father and dependant of one Uthayachandran a/l Gaur Chandram ('Uthaya'), a prisoner who sustained B severe injuries as a result of a fight between prison inmates. Uthaya was pronounced dead at the hospital he was brought to for treatment. The respondent sought damages for loss of support, as well as general damages for pain and suffering arising from the loss of his son, and exemplary damages. The High Court allowed the respondent's claim and awarded damages in the sum of C RM192,000 for the dependency claim, the sum of RM100,000 as general damages and the sum of RM100,000 as exemplary damages. The appellants appealed against that decision to the Court of Appeal. The Court of Appeal reduced the amount awarded for dependency claim and set aside the award for D exemplary damages; but it affirmed the award of general damages. The appellants have obtained leave to proceed with the instant appeals. The questions of law common to all three appeals for which leave was granted, related to ss 7 and 8 of the Civil Law Act 1956 ('the Act'). In Appeal No 36 the appellants contended that s 7 of the Act did not allow exemplary damages to be E awarded for arbitrary, oppressive or unconstitutional acts of the tortfeasor and that the Court of Appeal had erred in holding that exemplary damages could be awarded for breach of fundamental guarantees under the Federal Constitution. In Appeal No 52, the appellants submitted that under s 8(2) of the Act exemplary damages were not recoverable in an estate claim. In Appeal No 53, F the appellants submitted that the Court of Appeal had erred in awarding the respondent the sum of RM100,000 for pain and suffering because s 7 of the Act did not allow the respondent to make such a claim.

Held, allowing Appeal Nos 36, 53 and 52 in part:

G (1) **(per Zainun Ali FCJ, dissenting)** In Appeal No 52 the death of an individual whilst in police custody (if a wrongdoing by the latter was established) was a clear violation of the most fundamental liberty, entrenched in Part II of the Federal Constitution, ie of the right of life guaranteed in art 5(1). At the same time custodial deaths and similar acts H intentionally causing the death of persons did not fall within the purview of the definition of 'accidents' or of the Civil Law Act 1956 generally. The fact that it was not in dispute that this conduct/action amounted to a constitutional 'wrong' meant that the court could not apply ss 7 and 8 of the Act at all in its assessment of the proper remedy because both these I sections make provision for damages in respect of private tortious claims. These sections were not applicable to constitutional torts — which were what custodial death cases actually amounted to. In the circumstances, the real issue in such an appeal such as Appeal No 52 should be, how this court could mould and shape the appropriate remedy for a constitutional

breach; and by extension whether such a remedy could incorporate the award of exemplary damages to a claim made under s 8(2) of the Act. Consequently, where a wrong was committed by the state or an instrument of the state which had the effect of depriving the victim of his life, as in this appeal, the respondent was entitled, as a matter of right guaranteed to her by the Constitution, to exemplary or aggravated damages for the deprivation of the deceased's (Kugan's) life. Thus, although s 8 of the Act was inapplicable to Kugan's case, which related to a custodial death arising by reason of the breach of a constitutional right, an alternative interpretative approach could have yielded the same answer. In the circumstances and acting upon the dictates of art 162(6) of the Federal Constitution, s 8(2) of the Act should be amended to bring it into accord with the Federal Constitution (see paras 23–25, 28–34, 59–60, 63–64 & 70–85).

(2) **(per Zaharah Ibrahim FCJ, majority)** Section 7 of the Act enabled an action to be brought against a person whose wrongful act, neglect or default injured another and resulted in the death of the injured person if such wrongful act, neglect or default would have entitled the injured person to maintain such an action and recover damages in respect of such injury had the injured person not died. At the same time an action under s 7 of the Act could only be brought by the specified dependants and the estate of the deceased person in their own right. In addition, s 7(3) of the Act clearly specified that the specified dependants could only claim damages of a compensatory nature for loss of support. Thus, an award of exemplary damages under s 7 of the Act was clearly contrary to the legislature's intention in enacting that section. Hence, an express provision disallowing such an award was not required in s 7 of the Act and exemplary damages could not be awarded in claims founded on s 7 of the Act. Appeal No 36 was a pure dependency claim under s 7 of the Act and the Court of Appeal erred in ordering exemplary damages to be paid by the appellants (see paras 173–176, 178–181 & 217–218).

(3) **(per Zaharah Ibrahim FCJ, majority)** Section 7 of the Act was a provision enabling the specified dependants of a deceased person who came by his death due to the wrongful act, neglect or default of another to claim for damages in their own right to compensate them for loss of support due to such death. As such, a claim for pain and suffering by the respondent in Appeal No 53 was certainly beyond the purview of s 7 of the Act. The proviso to s 7(3) of the Act did not allow damages to be awarded to a parent for being deprived of the services of a child. For loss other than pecuniary loss, the only damages that s 7 of the Act allowed to be claimed were damages for bereavement. However, such damages could only be awarded to the spouse of a deceased person or, if he was a minor and never married, his parents. The sum that could be awarded as damages for bereavement was RM10,000, subject to the power of the

Yang di-Pertuan Agong to vary such sum. As such, the respondent in Appeal No 53 was not entitled to claim general damages for pain and suffering in a dependency claim brought under s 7 of the Act (see paras 182, 185–188 & 228).

(4) **(per Zaharah Ibrahim FCJ, majority)** As for Appeal No 52, the award of exemplary damages by the Court of Appeal was clearly contrary to the bar expressly set out in s 8(2) of the Act. As such, the award of exemplary damages ought to be set aside. In view of the acts done or omitted to be done to Kugan which contributed to the cause of his death, the amount of RM100,000 awarded as damages for misfeasance in public office was inappropriate and ought to be reduced to RM50,000 to reflect only those acts, which were done or omitted to be done by police officers before Kugan's death (see paras 190–191, 208–209, 220–221 & 224–226).

[Bahasa Malaysia summary

Penghakiman ini melibatkan tiga rayuan sivil, yang timbul daripada tiga kes berbeza di Mahkamah Tinggi. Walau bagaimanapun, oleh kerana persamaan fakta dan isu dalam ketiga-tiga rayuan itu daripada Mahkamah Rayuan ia didengar bersama oleh mahkamah ini. Dalam rayuan pertama ('Rayuan No 36'), responden-responden merupakan tiga anak-anak kepada Abdul Jaafar bin Abd Mutalib ('Jaafar'), yang telah meninggal dunia semasa kejadian tembak-menembak di antara polis dan Jaafar dan tiga yang lain. Responden-responden menuntut ganti rugi untuk kehilangan kebergantungan, dan untuk ganti rugi teladan dan ganti rugi teruk. Mahkamah Tinggi mendapati bahawa pasukan polis itu telah bertindak mempertahankan diri apabila mereka mula menembak selepas Jaafar dan tiga yang lain telah menembak ke arah mereka. Oleh itu, Mahkamah Tinggi telah menolak tuntutan responden-responden dengan kos. Atas rayuan, Mahkamah Rayuan mendapati bahawa perayu-perayu tidak melepaskan beban untuk membuktikan yang mereka mempertahankan diri dan oleh itu membenarkan rayuan. Mahkamah Rayuan kemudian telah mengawardkan ganti rugi berjumlah RM51,000 untuk tuntutan kebergantungan responden-responden dan ganti rugi teladan berjumlah RM300,000. Dalam rayuan kedua ('Rayuan No 52'), responden adalah ibu, orang yang bergantung dan pentadbir harta pesakan Kugan a/l Ananthan ('Kugan'), yang meninggal dunia semasa dalam tahanan polis. Post mortem yang dijalankan menunjukkan bahawa Kugan telah meninggal dunia akibat kegagalan buah pinggang akut selepas diseksa dan dipukul sehingga mati semasa dalam tahanan polis. Responden menuntut di bawah ss 7 dan 8 Akta tersebut untuk kehilangan penyara. Dia juga menuntut ganti rugi untuk misfeasans di pejabat awam, serangan dan pukulan, dan penahanan salah dan untuk ganti rugi teruk, ganti rugi teladan, ganti rugi yang membersihkan dan ganti rugi khas. Mahkamah Tinggi membenarkan tuntutan responden dan mengawardkan sejumlah RM801,700 sebagai ganti rugi termasuk jumlah RM100,000 untuk misfeasans di pejabat awam dan

jumlah RM300,000 untuk ganti rugi teladan. Perayu-perayu telah merayu terhadap keputusan tersebut kepada Mahkamah Rayuan. Mahkamah Rayuan telah membenarkan sebahagian daripada rayuan oleh perayu-perayu itu dan memerintahkan agar award untuk penahanan salah diketepikan; tetapi ia telah mengesahkan bahagian lain award itu. Dalam rayuan ketiga ('Rayuan No 53'), responden adalah bapa dan orang yang bergantung kepada Uthayachandran a/l Gaur Chandram ('Uthaya'), seorang banduan yang mengalami kecederaan teruk akibat pergaduhan antara penghuni penjara lain. Uthaya telah disahkan meninggal dunia di hospital yang dia dibawa untuk rawatan. Responden memohon ganti rugi untuk kehilangan penyara, dan juga ganti rugi am untuk kesakitan dan kesengsaraan yang timbul akibat kehilangan anaknya dan ganti rugi teladan. Mahkamah Tinggi membenarkan tuntutan responden dan mengawardkan ganti rugi berjumlah RM192,000 untuk tuntutan kebergantungan, jumlah RM100,000 untuk ganti rugi am dan jumlah RM100,000 untuk ganti rugi teladan. Perayu-perayu telah merayu terhadap keputusan tersebut kepada Mahkamah Rayuan. Mahkamah Rayuan telah mengurangkan jumlah yang diawardkan untuk tuntutan kebergantungan dan mengetepikan award untuk ganti rugi teladan; tetapi telah mengesahkan award untuk ganti rugi am. Perayu-perayu telah memperoleh kebenaran untuk meneruskan rayuan-rayuan ini. Persoalan undang-undang yang sama untuk semua tiga rayuan yang mana kebenaran diberikan, adalah berkaitan ss 7 dan 8 Akta Undang-Undang Sivil 1956 ('Akta tersebut'). Dalam Rayuan No 36 perayu-perayu berhujah bahawa s 7 Akta tersebut tidak membenarkan ganti rugi teladan diawardkan kerana untuk tindakan pelaku tort yang sewenang-wenangnya, menindas atau tidak berperlembagaan dan bahawa Mahkamah Rayuan telah terkhilaf kerana memutuskan ganti rugi teladan boleh diawardkan kerana pelanggaran jaminan asas di bawah Perlembagaan Persekutuan. Dalam Rayuan No 52, perayu-perayu berhujah bahawa di bawah s 8(2) Akta tersebut ganti rugi teladan tidak boleh diperolehi semula dalam tuntutan harta pesaka. Dalam Rayuan No 53, perayu-perayu berhujah bahawa Mahkamah Rayuan telah terkhilaf dalam mengawardkan responden sejumlah RM100,000 untuk kesakitan dan kesengasaraan kerana s 7 Akta tersebut tidak membenarkan responden membuat tuntutan sedemikian.

Diputuskan, membenarkan sebahagian daripada Rayuan No 36, 53 dan 52:

(1) **(oleh Zainun Ali HMP, menentang)** Dalam Rayuan No 52 kematian seorang individu semasa dalam tahanan polis (jika salah laku polis dapat dibuktikan) adalah pelanggaran yang jelas berhubung kebebasan yang paling asas, yang termaktub dalam Bahagian II Perlembagaan Persekutuan, iaitu hak untuk hidup yang dijamin dalam perkara 5(1). Pada masa sama kematian tahanan dan tindakan sama yang disengajakan menyebabkan kematian orang yang tidak terjatuh dalam skop definisi 'accidents' atau Akta Undang-Undang Sivil 1956 secara amnya. Fakta bahawa ia tidak dipertikaikan bahawa kelakuan/tindakan ini merupakan

A 'wrong' perlembagaan bermaksud mahkamah tidak boleh menggunapakai ss 7 dan 8 Akta tersebut langsung dalam penilaiannya untuk remedi yang sewajarnya kerana kedua-dua seksyen tersebut adalah untuk ganti rugi berkaitan tuntutan tort peribadi. Seksyen-seksyen tersebut tidak terpakai kepada tort perlembagaan — yang mana
B merupakan kes-kes kematian tahanan sebenar. Dalam keadaan berikut, isu sebenar dalam rayuan sedemikian seperti Rayuan No 52 sepatutnya, bagaimana mahkamah ini boleh mencorak dan membentuk remedi yang sesuai untuk pelanggaran perlembagaan; dan melalui lanjutan sama ada remedi sedemikian boleh digunakan untuk award ganti rugi teladan
C untuk tuntutan yang dibuat di bawah s 8(2) Akta tersebut. Berikutan itu, di mana terdapat kesalahan yang dilakukan oleh negeri atau instrumen negeri yang memberi kesan menafikan nyawa mangsa (Kugan). Oleh itu, meskipun s 8 Akta tersebut tidak terpakai kepada kes Kugan, yang berkaitan kematian tahana yang timbul oleh kerana pelanggaran hak
D perlembagaan, pendekatan pentafsiran alternatif mungkin memperoleh jawapan yang sama. Dalam keadaan berikut dan bertindak berdasaran telunjuk perkara 162(6) Perlembagaan Persekutuan, s 8(2) Akta tersebut patut dipinda agar ia selaras dengan Perlembagaan Persekutuan (lihat perenggan 23–25, 28–34, 59–60, 63–64 & 70–85).

E (2) **(oleh Zaharah Ibrahim HMP, majoriti)** Seksyen 7 Akta tersebut membolehkan suatu tindakan dimulakan terhadap seseorang yang mana perbuatan salah, cuai atau kegagalan telah mencederakan seorang yang lain dan mengakibatkan kematian orang yang cedera itu jika perbuatan
F salah, cuai atau kegagalan itu memberi hak kepada orang yang cedera itu mengekalkan tindakan tersebut dan mendapat semula ganti rugi berkaitan kecederaan itu sekiranya orang yang cedera itu tidak meninggal dunia. Pada masa sama suatu tindakan di bawah s 7 Akta tersebut hanya boleh dimulakan oleh orang yang bergantung yang tertentu sahaja dan
G harta pesaka di mati yang mempunyai hak. Tambahan lagi, s 7(3) Akta tersebut jelas menyatakan bahawa orang yang bergantung yang tertentu sahaja boleh menuntut ganti rugi yang bersifat pampasan untuk kehilangan penyara. Oleh itu, award untuk ganti rugi teladan di bawah s 7 Akta tersebut jelas bertentangan dengan niat badan perundangan
H dalam menggubal seksyen tersebut. Justeru, peruntukan nyata yang tidak membenarkan award sedemikian tidak dikehendaki dalam s 7 Akta tersebut dan ganti rugi teladan tidak boleh diawardkan dalam tuntutan yang berasaskan s 7 Akta tersebut. Rayuan No 36 adalah tuntutan kebergantngan semata-mata di bawah s 7 Akta tersebut dan Mahkamah
I Rayuan terkhilaf dalam memerintahkan ganti rugi teladan dibayar oleh perayu-perayu (lihat perenggan 173–176, 178–181 & 217–218).

(3) **(oleh Zaharah Ibrahim HMP, majoriti)** Seksyen 7 Akta tersebut adalah peruntukan yang membolehkan orang yang bergantung yang tertentu kepada si mati yang telah meinggal dunia akibat perbuatan salah, cuai

atau kegagalan seseorang yang lain untuk menuntut ganti rugi menurut hak mereka sendiri bagi memperoleh pampasan mereka untuk kehilangan penyara akibat kematian tersebut. Oleh itu, suatu tuntutan untuk kesakitan dan kesengsaraan oleh responden dalam Rayuan No 53 sememangnya melampaui skop s 7 Akta tersebut. Proviso kepada s 7(3) Akta tersebut tidak membenarkan ganti rugi diawardkan kepada ibubapa yang dilucutkan perkhidmatan seorang anak. Untuk kehilangan selain daripada kehilangan kewangan, satu-satu ganti rugi yang dibenarkan untuk dituntut oleh s 7 Akta tersebut adalah ganti rugi untuk perkabungan. Walau bagaimanapun, ganti rugi sedemikian hanya boleh diawardkan kepada pasangan si mati atau, jika dia masih di bawah umur dan tidak pernah berkahwin, ibubapanya. Jumlah yang boleh diawardkan sebagai ganti rugi untuk perkabungan adalah RM10,000 tertakluk kepada kuasa Yang di-Pertuan Agong untuk mengubah jumlah tersebut. Oleh itu, responden dala Rayuan No 53 tidak berhak menuntut ganti rugi am untuk kesakitan dan kesengsaraan dalam tuntutan kebergantungan yang dimulakan di bawah s 7 Akta tersebut (lihat perenggan 182, 185–188 & 228).

(4) **(oleh Zaharah Ibrahim HMP, majoriti)** Berhubung Rayuan No 52, award untuk ganti rugi teladan oleh Mahkamah Rayuan jelas bertentangan dengan had yang jelas dinyatakan dalam s 8(2) Akta tersebut. Oleh itu, award untuk ganti rugi teladan patut diketepikan. Berdasarkan tindakan yang dilakukan atau tidak dapat dilakukan kepada Kugan yang menyumbang kepada sebab kematiannya, jumlah RM100,000 yang diawardkan sebagai ganti rugi untuk misfeasans dalam jawatan awam adalah tidak sesuai dan patut dikurangkan kepada RM50,000 untuk menggambarkan hanya tindakan tersebut, yang telah dilakukan atau tidak dapat dilakukan oleh pegawai polis sebelum kematian Kugan (lihat perenggan 190–191, 208–209, 220–221 & 224–226).]

Notes

For cases on application in general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4561–4569.

Cases referred to

Abd Malek bin Hussin v Borhan bin Hj Daud & Ors [2008] 1 MLJ 368, HC (not folld)

Ashley and another v Chief Constable of Sussex Police [2008] 3 All ER 573; [2008] 2 WLR 975, HL (distd)

Assa Singh v Mentri Besar, Johore [1969] 2 MLJ 30, FC (refd)

Attorney General of Saint Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129, PC (refd)

A *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328, PC (distd)
Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285, FC (refd)
Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics 403 US 388 (1971), SC (refd)
B *Boyce and another v The Queen* [2005] 1 AC 400; [2004] UKPC 32, FC (refd)
DK Basu v State of West Bengal (1997) 1 SCC 416, SC (refd)
Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (refd)
Davies and another v Powell Duffryn Associated Collieries, Limited [1942] AC
C 601, HL (refd)
Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)
Durity v Attorney General of Trinidad and Tobago [2003] 1 AC 405, PC (refd)
Gairy and another v Attorney General of Grenada [2002] 1 AC 167, PC (refd)
D *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, CA (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289, CA (refd)
Kuddus v Chief Constable of Leicestershire Constabulary [2001] 3 All ER 193;
E [2001] UKHL 29, HL (refd)
Lee Kwan Woh v PP [2009] 5 MLJ 301, FC (refd)
Leung Kwok Hung & Ors v Hong Kong Special Administrative Region [2005] HKCU 887 (refd)
Maharaj v Attorney General of Trinidad and Tobago (No 2) [1978] 2 All ER 670,
F PC (refd)
Merson v Cartwright and Another [2005] UKPC 38; [2006] 3 LRC 264, PC (distd)
Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383; [1970] HC 60, HC (refd)
Nilabati Behera alias Lalit v State Of Orissa And Ors 1993 SCR (2) 581, SC
G (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12, FC (refd)
R (on the application of Lumba) v Secretary of State for the Home Department [2011] UKSC 12, SC (refd)
H *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd)
R v Bates [1982] 2 NSWLR 894 (refd)
Raja Mohktar bin Raja Yaacob v Public Trustee, Malaysia [1970] 2 MLJ 151 (refd)
I *Rookes v Barnard* [1964] 1 All ER 367; [1964] AC 1129, HL (refd)
Sambu Pernas Construction & Anor v Pitchakkaran [1982] 1 MLJ 269, FC (refd)
Three Rivers District Council and others v Bank of England [2000] 3 All ER 1; [2003] 2 AC 1; [2000] 2 WLR 1220, HL (folld)

Legislation referred to

Constitution of Trinidad and Tobago [TT] ss 6(1), 14, 14(1), (2)
Compensation for Injuries Act [TT]
Civil Law Act 1956 ss 7, 7(3), 8, 8(2), (2)(a), Part III
Constitution of the Bahamas [BS] art 28, 28(1), (2)
Courts of Judicature Act 1964 Schedule, para 1
Dangerous Drugs Act 1952 s 39B(2)
Fatal Accidents Acts 1976 [UK]
Federal Constitution arts 5, 5(1), 8, 21, 162, 162(6), Part II
Indian Constitution [IND] art 21
Law Reform (Miscellaneous Provisions) Act 1934 [UK]
Penal Code
Police Act 1967 s 24
Restricted Residence Enactment (Cap 39)
Supreme Court of Judicature Act [TT] s 27

Alice Loke Yee Ching (Habibah bt Harun and Zureen Elina bt Mohd Dom with her) (Senior Federal Counsel, Attorney General's Chambers) in Civil Appeal Nos 01(f)-36–05 of 2015(W), 01(i)-52–10 of 2015(W) and 01(f)-53–10 of 2015(W) for the appellants.
V Rajadevan (Rajadevan & Assoc) in Civil Appeal No 01(f)-36–05 of 2015(W) for the respondents.
R Sivarasa (Bani Prakash and Shahid Adli bin Kamarudin with him) (Edwin & Suren) in Civil Appeal No 01(i)-52–10 of 2015(W) for the respondent.
Kiran Kaur (Jaswin Abraham with him) (Shanti Jeyapalan, Zeti Zulfah & Partners) in Civil Appeal No 01(f)-53–10 of 2015(W) for the respondent.

Zainun Ali FCJ (delivering dissenting judgment of the court):

[1] The trilogy of appeals before us, arising from three separate cases, heard before three different judges of the High Court and different panels of the Court of Appeal now fall to be determined.

[2] The questions of law common to all three appeals for which leave was granted, relate to ss 7 and 8 of the Civil Law Act 1956 ('the CLA').

[3] After having read the judgment of my learned sister Justice Zaharah Ibrahim, I agree with her in Appeal No 01(f)-36–05 of 2015(W) ('Appeal No 36') and Appeal No 01(f)-53–10 of 2015(W) ('Appeal No 53'), which now forms the majority decision.

[4] However, I would take a slightly different approach as regards part of Appeal No 01(i)-52–10 of 2015 (W) ('Appeal No 52'). The questions of law in Appeal No 52 are:

(2) Whether section 8(2) of the Civil Law Act 1956 (Act 67) which bars the awarding of exemplary damages in an estate claim is applicable where the death of the deceased is as a result of a breach of his constitutional right to life;

(3) For the purpose of an estate claim under section 8 of the Civil Law Act 1956 (Act 56), whether the acts that make up the tort of misfeasance in public office must be the acts that occurred before the death of the deceased.

My reasons are as follows.

APPEAL NO 52

[5] In this appeal, for ease of reference I shall refer to the deceased as 'Kugan'.

As the facts in 'Kugan's' appeal have been lucidly laid down in the judgment, I shall refrain from regurgitating them, save to express some salient points.

The deceased Kugan, was in the custody of the police and died whilst in custody some five days later. The post-mortem conducted disclosed that he had, inter alia, 45 categories of external injuries and numerous internal ones. He died of acute renal failure arising from rhabdomyolosis which was caused by blunt trauma injury to his skeletal muscles. Thus, it would not be putting too fine a point on it to state that he was tortured and beaten to death whilst in the custody of the police.

[6] In the High Court, Kugan's mother ('the respondent') as the administratrix of his estate and dependant, claimed for damages against the appellants and Navindran ('the second defendant'), for negligence and/or breach of statutory duties resulting in Kugan's death, since at that time Kugan was under police detention.

[7] The respondent's claim was made under s 7 of the CLA for loss of support. The respondent's claim was also based on s 8 of the CLA for the benefit of Kugan's estate. She claimed for damages, misfeasance in public office, assault and battery, false imprisonment and for aggravated damages, exemplary damages, vindicatory damages and special damages.

[8] The High Court allowed the respondent's claim, awarding her a total of RM801,700 as damages, including damages for misfeasance in public office (in the sum of RM50,000) and exemplary damages (in the sum of RM300,000).

[9] On Appeal to the Court of Appeal, the appellants contended that both ss 7 and 8 of the CLA do not contemplate that a claim for damages can be made

for the tort of misfeasance in public office. The Appellant also contended that sub-s 8(2) of the CLA is unequivocal in its bar for exemplary damages.

[10] Only the second appellant appealed against the finding of liability by the High Court.

[11] In allowing the appellants' appeal in part (where it ordered that the award for false imprisonment be set aside), the Court of Appeal affirmed the rest of the High Court award.

[12] In so doing, the Court of Appeal had this to say:

> 66. We start with our deliberation by referring to arts 5 and 8 of the Federal Constitution which read as follows:
>
> Article 5
>
> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> Article 8
>
> (1) All persons are equal before the law and entitled to the equal protection of the law.
>
> 67. Both articles of the Federal Constitution speak for themselves and need no further explanation from us. The basic premise of these articles is universal and that is every human life is sacred and every citizen of this country, including suspects of crimes or convicted criminals, is expected to be treated with human decency during their detention and the protection of the law. In the context of this case, a person's life was deprived of or taken away not in accordance with law as commanded by the Federal Constitution but by means which did not fit any semblance of human decency.
>
> 68. In interpreting any statute, it is our considered view that the courts must always be vigilant to any interpretation which may dilute the importance of any constitutional rights of this country. The significance of any breach of any basic rights provided for in the Federal Constitution cannot be viewed in the same manner as a breach of say 'traffic law' for the simple reason that there is no greater breach than that of a breach of a constitutional supremacy as opposed to parliamentary supremacy. Hence it is incumbent on the courts when interpreting and statutes, resort must be made to the Federal Constitution when appropriate to do so.

[13] The Court of Appeal approved the House of Lord's decision in *Ashley and another v Chief Constable of Sussex Police* [2008] 3 All ER 573; [2008] 2 WLR 975 (HL).

[14] However it is my view that *Ashley*'s case is not entirely relevant here,

since Lord Scott of Foscote, whilst advocating vindicatory damages for the breach of a constitutional right in *Ashley*, did not decide that it should be awarded.

[15] The Court of Appeal and the High Court could have misread the outcome, as Lord Scott's statement did not result in the House of Lords permitting the grant of exemplary damages in a claim made under the UK Law Reform (Miscellaneous Provisions) Act.

[16] Be that as it may, the Court of Appeal saw no impediment in awarding exemplary damages to the respondent when it found that:

> 77. As to whether exemplary damages should be awarded, we see no clearer case as in this case where it must be given to reflect the severity of the breach. The circumstances in which the deceased's constitutional right was breach have been dealt with in detail by the learned Judge and affirmed by us earlier in our grounds. Any reasonable tribunal in our view would conclude that this is an appropriate case to award exemplary damages. Not to award such exemplary damages would in our mind be 'not attending to the mutilation with the appropriate care'.
>
> 78. As for the quantum of the exemplary damages, there is also no reason to disturb the award granted by the learned Judge as it commensurate with the actions of the defendants.

[17] Thus, turning to the question at hand as set out above, it is evident that Kugan's life was not taken in accordance with the law. His death amounted to a contravention of his right to life as guaranteed in art 5 of the Federal Constitution. It is not in dispute, as evidenced by the reasoning in the courts below, that his death amounted to a breach or contravention of a constitutional right.

[18] The Court of Appeal also said that:

> 73. As stated earlier, this country practises Constitutional Supremacy and thus any breach of any Constitutional right must be jealously guarded by the courts and protected with the severity as it justly deserves. A Constitution so to speak is the heart of a country and the blood vessels of the heart are the entrenched rights of every citizen of the country. Any mutilation of those blood vessels must be attended to immediately and with the appropriate measures as any failure to do so would lead to the obvious diagnosis of a weak heart.

[19] The Court of Appeal found a breach of a constitutional right by a public authority and said that sub-s 8(2) of the CLA does not apply and that courts are not prevented from awarding exemplary damages; the Court of Appeal went on to say that the above proposition is fortified by the fact that when the CLA was legislated in 1956, the Federal Constitution was not even in

existence then. The Court of Appeal's position was that when the CLA was enacted in 1956 it was in respect of private tortuous actions; and that the tort of *public* misfeasance had not been developed yet. Thus s 8 of the CLA only applies to private torts in so far as the prohibition of awarding damages is concerned.

For this one has to look again at the provisions of the Courts of Judicature Act 1964 and ss 7 and 8 of the CLA, where the private and public law construct subsists.

[20] The courts below had established that there is a constitutional breach. What should then be the approach to be taken?

[21] The argument was that on the strength of *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 ('Sambu Pernas'), the Federal Court decided that as the right of the dependants of a deceased person and the estate of a deceased person to claim for damages is conferred by statute, *that claim must be determined strictly within the confines of the statute*. As held by the court in *Sambu Pernas*:

> Had it not been for ss 7 and 8 of the Civil Law Act, it is clear that the respondent *could not have the right to bring the suit* ... (Emphasis added.)

However is this position tenable in the face of a breach of a constitutional right?

[22] Introspectively or otherwise, a scrutiny of the position is that the doctrine of *ubi jus, ibi remedium* (that there is no wrong without a remedy) is still very much alive. Hence, such a breach of a constitutional right should result in an appropriate constitutional remedy, which would, in my view, be separate and distinct from remedies under statute, common law and equity.

THE CIVIL LAW ACT 1956 ('THE CLA')

[23] The CLA deals with multiple statutory provisions relating to the conduct of civil litigation. Sections 7 and 8 comprise Part III of the CLA which is entitled 'Fatal Accidents and ...'.

[24] These sections deal with the provisions of compensation:

(a) for persons who die as a consequence of tortious acts or omissions: and

(b) makes provisions for the dependants of such deceased.

[25] In essence, they make provision for damages in respect of private tortious claims. Subsection 8(2) which is the section in question expressly

provides that exemplary damages cannot be paid in respect of a fatal accident, which includes death as a consequence of assault and battery. These sections take their roots from equivalent English statutory law. Under the common law the position (some hundreds of years in England) was that a death as a result of an injury did not give rise to any cause of action as any such claim was 'buried with the deceased'. In short, there was no cause of action available for such a death. Furthermore, the estate could not recover anything because there was no cause of action available to be transmitted to them.

[26] Therefore in the United Kingdom, statutory provisions were introduced through what is commonly referred to as Lord Campbell's law which provided a cause of action for unlawful deaths. And subsequently, vide the Law Reform (Miscellaneous Provisions) Act 1934, statutory provisions were made to allow the deceased's cause of action to vest in the estate or in his personal representatives.

[27] The English statutory provisions have a section similar to our sub-s 8(2) prohibiting the grant of exemplary damages for death as a result of a wrongful act. That was incorporated in our s 8(2) and is the section in issue in this appeal.

[28] My view is that the said section has no application at all to cases particularly those involving custodial deaths for the following reasons:

(a) the CLA, vide ss 7 and 8 deal with 'fatal accidents' as a consequence of wrongful acts or omissions and prescribe the types and limits of compensation payable for the death of the deceased to the estate. It deals with private tort actions. Perhaps more pertinently, it deals with deaths arising by way of 'accidents'. It does not deal with instances where an individual is killed while in protective custody — since such deaths do not fall within the definition of 'accidents';

(b) the CLA deals with private tort actions. A custodial death (apart from giving rise to criminal repercussions) encompass a public law element;

(c) the CLA was brought into force prior to the Federal Constitution and cannot be utilised to construe or limit fundamental rights set out in the Federal Constitution; and

(d) it is not applicable to constitutional torts — which is what custodial death cases actually amount to.

[29] Given the foregoing, is it then correct to utilise ss 7 and 8 of the CLA 1956 to construe, limit or restrain the possible remedies available for a contravention of a constitutional right?

[30] The remedy for the contravention of a constitutional right is usually a declaration. When it is a statute that is not in compliance with the Constitution, it is struck down and held to be void. However in the instant case, that is not necessary, because the question does not arise, as custodial deaths and similar acts intentionally causing the death of persons also do not fall within the purview of the definition of 'accidents' or the CLA generally. The fact that is not in dispute that this conduct/action amounts to a constitutional 'wrong' means that the court ought not to apply ss 7 and 8 at all in its assessment of the proper remedy.

[31] In my view, a declaration would not provide any form of effective remedy to redress a constitutional breach of arts 5 and 8. What then would be the appropriate remedy?

[32] The question can be answered by looking again at the statutes, ie the CLA, vis a vis the Federal Constitution.

[33] As was clearly stated earlier, the CLA pre-dates the Federal Constitution. The latter is the supreme law of the land and it is imperative that it ought not be interpreted by the use of the canons of construction that are employed as guides for the interpretation of ordinary statutes.

[34] More importantly, the Federal Constitution is of a different genre from that of statutes — *it is a document sui generis, governed by interpretive principles of its own*. Thus in its interpretation, 'a prismatic approach' is called upon on the courts, especially when fundamental rights as guaranteed under Part II of the Constitution are concerned (see *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301).

[35] In this very important aspect, one finds comfort in the wisdom of the Federal Court decision of *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, where Raja Azlan Shah as LP (as His Royal Highness then was) said that:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v Fisher* [1979] 3 All ER 21). A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberfore in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the

A tradition and usages which have given meaning to that language. It is quite consistent with this, and with the recognition and rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect of those fundamental rights and freedoms'.

B

[36] The principle of interpreting a constitution with less rigidity and more generosity was again applied by the Privy Council in *Attorney General of Saint Christopher, Nevis and Anguilla v Reynolds* [1979] 3 All ER 129 at p 136.

C

[37] The Federal Court in *Lee Kwan Woh* cited the case of *Boyce and another v The Queen* [2005] 1 AC 400; [2004] UKPC 32 where Lord Hoffman observed that:

... Parts of the Constitution, and in particular the fundamental rights provisions of
D Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the enlightenment and beyond. And they would
E have been aware that sometimes the practical expression of these concept-what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these generation of judges to the enterprise of giving life to the abstract statements of fundamental rights.

F

It is in this context that this instant appeal is approached.

THE POSITION IN THE USA

G **[38]** In the United States, the emergence of damages as a remedy for the enforcement of constitutional guarantee dated as far back as 1871. In the case of *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics* 403 US 388 (1971), the Supreme Court recognised a cause of action against federal officials implicit in the constitution.

H

[39] In other words, in the US there is recognition of a cause of action in tort for a breach of a right protected or guaranteed by the constitution and it is called a constitutional tort. That opens up into an entirely new area with wide
I ranging consequences and would require a lot of further study and submission. In any case, it is also in issue as to whether this court would consider and adopt American law.

THE POSITION IN ENGLAND

[40] The case utilised as the basis not to award exemplary damages but instead an attempt to award vindicatory damages is *R v Ashley*, is arguably different from that of custodial death. In that case, the police shot an unarmed and naked man in his flat when they went to conduct an investigation. He died. The policeman was acquitted of any criminal wrongdoing. But the House of Lords (Lord Scott of Foscote who wrote the main judgment) held that this was an appropriate case for the award of vindicatory damages. However they did not grant exemplary damages. The point though is that, they did recognise that the deceased/his estate was entitled to vindicatory damages in principle. The case was heard at an interlocutory stage, namely striking out. The Court of Appeal reinstated it and the House of Lords agreed, ordering that the matter proceed to trial. So it was determined at a stage when there was no evidential record.

[41] This is quite different from Kugan's case where in the latter, it is not in dispute that a constitutional breach occurred in that he was deprived of his right to life, not in accordance with the law.

[42] The basis for the award of exemplary damages for constitutional wrongs in the United Kingdom is the case of *Rookes v Barnard* [1964] 1 All ER 367 whereby the first limb recognises the ability to do so when there has been behaviour which is oppressive, arbitrary or unconstitutional action by servants of the government. So in the UK, recourse to exemplary damages where there has been a constitutional wrong is well established and the provisions of their equivalent of the CLA has not in any manner deterred the ability to make such a claim. So to construe the CLA as impeding the right to award constitutional damages is not quite correct, since the CLA simply does not apply, as it deals with private torts.

The English courts have moved on from *Rookes v Barnard* and have adopted a wider test, criticising the need to be limited or restrained to the three categories of that case. *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193; [2001] UKHL 29. This only further supports the proposition that exemplary damages are available for a breach of a constitutional right.

THE POSITION IN INDIA

[43] In *DK Basu v State of West Bengal* (1997) 1 SCC 416, the Supreme Court speaking through Justice Anand, stated:

> Custodial death is perhaps one of the worst crimes in a civilised society governed by the Rule of Law. The rights inherent in Article 21 and 22(1) of the Constitution required to be jealously and scrupulously protected.

[44] In *Basu*, Justice Anand undertook a survey of decisions in courts in the Commonwealth which had a similar conclusion: Ireland, New Zealand and Trinidad: see pp 440–443.

PRIVY COUNCIL DECISIONS

[45] I agree with the majority in this judgment that the context of the Privy Council decisions in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 and *Merson v Cartwright and another* [2005] UKPC 38 (see judgment below) appear to have been misunderstood since both these cases arose from applications for redress made directly to the High Court under the Constitutional provisions of Trinidad & Tobago, and the Supreme Court under the provisions of the Constitution of the Bahamas respectively.

[46] The other case such as *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1978] 2 All ER 670 is of the same genre. Compensation was awarded to an individual for false imprisonment, contrary to the constitution. This is because Trinidad has s 6(1) in its Constitution, which entitled any person who alleges a breach of a fundamental right under the Constitution to seek 'redress' from the courts. Lord Diplock, delivering the majority judgment, in granting monetary compensation as part of 'redress', stated that it was ordered under public law for deprivation of liberty and not under private law.

[47] Undoubtedly our Federal Constitution has no such provision. Two other Privy Council decisions, ie *Gairy and another v Attorney General of Grenada* [2002] 1 AC 167 and *Durity v Attorney General of Trinidad and Tobago* [2003] 1 AC 405 were decided in the same vein. In *Gairy*, Lord Bingham, delivering the judgment for the Privy Council, stated that a court must be ready to exercise power to grant relief for a contravention of a protected constitutional right, even if it means a new remedy (see p 181B–C).

[48] Lord Nicholls in *Durity* in delivering the judgment of the Privy Council, noted that constitutional proceedings are not capable of being brought between subjects, but by their nature concern claims by a subject against the state for its failure to secure his fundamental liberty. He also observed that the Constitution itself contained no express limitation period for the commencement of constitutional proceedings, and the court should not, by a side wind, accept a rigid and short time bar imposed by statute (see p 416A–G in *Durity*). Thus, wide and generous substantive rights granted to an individual by the supreme law, the Constitution, should not be taken away by restrictive legislation enacted by Parliament.

THE POSITION IN HONG KONG

[49] The courts of Hong Kong have adopted a similar approach when interpreting their basic law. As was illustrated in *Lee Kwan Woh*, Gopal Sri Ram FCJ approved the position taken by Hong Kong's Court of Final Appeal in *Leung Kwok Hung & Ors v Hong Kong Special Administrative Region* [2005] HKCU 887 where Li CJ said, inter alia, that:

> ... It is well established in our jurisprudence that the courts must give such a fundamental right a generous interpretation so as to give individuals its full measures ... Needless to say, in society governed by the rule of law the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.

[50] Thus in my view, it is clear that the rights embedded in the Federal Constitution are not abstracts but tangibles, capable of their own dynamics. The effect of art 8 is surely to require fairness in legislative administrative and judicial action. Article 8 also 'houses within it the doctrine of proportionality which is the test to be used when determining whether any form of State action (Executive, Legislative or Judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed' (*Lee Kwan Woh*).

[51] It might be argued that the provision of para 1 of the Schedule of the Courts of Judicature Act 1964 can be utilised, which reads:

> Powers to issue to any person or authority direction, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others for the *enforcement* of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. (Emphasis added.)

[52] The significance of the word 'enforcement' above is encapsulated neatly by the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, when Edgar Joseph Jr FCJ quoted Samuels RA in *R v Bates* [1982] 2 NSWLR 894 where the word 'enforced' means:

> ... to compel observance of ...

[53] In approving the above proposition, the court went on to give emphasis to the nature and effect of the remedies envisaged by para 1 of the Schedule. The court said that para 1 of the Schedule dealt primarily with public law concepts and public law remedies.

[54] Quoting *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, Edgar Joseph Jr FCJ said that the High Court should be empowered to grant relief which is ordinarily beyond the scope of the usual public law remedies.

[55] The wide berth given to our courts was endorsed clearly in the language employed by the Federal Court in *R Rama Chandran*. It said that the courts 'are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our written law when determining the nature and scope of their powers' (per Edgar Joseph Jr FCJ).

[56] An important facet of the decision in *R Rama Chandran* was the approval which our Federal Court accorded to the decision of the Supreme Court of India, in moulding and shaping the appropriate constitutional remedies for breaches of constitutionally protected fundamental rights, when it approved the Indian case of *Nilabati Behera alias Lalit v State Of Orissa And Ors* 1993 SCR (2) 581.

[57] *Nilabati* is of particular significance because the Supreme Court of India ordered constitutional damages to be paid to a widow for the death of her son in police custody, since it constituted a violation by the state of his right to life, guaranteed under art 21 of the Indian Constitution.

[58] It was stated in *Nilabati* that the court should be prepared, 'to forge new tools and to devise new remedies' for the purpose of vindicating the precious fundamental liberty of life and liberty under art 21 (of the Indian Constitution).

[59] Thus in view of the above and in response to the question posed (question (2)) in this appeal, the poser is how is this court to mould and shape the appropriate remedy for a constitutional breach; and by extension could such a remedy incorporate the award of exemplary damages to a claim made under sub-s 8(2) of the CLA?

CONSTITUTIONAL REMEDIES

[60] Let me begin by saying that the death of an individual whilst in police custody (if a wrongdoing by the latter is established) is a clear violation of the most fundamental liberty, entrenched in Part II of the Federal Constitution, ie of the right of life guaranteed in art 5(1).

[61] This was never more succinctly expressed and decided than in the authority of *Lee Kwan Woh v Public Prosecutor* where, the Federal Court observed that:

> ... it is clear from the authorities that it is a fundamental right guaranteed by art 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with State actions that is fair both in

point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. A

The court went on to say that:

... when art 5(1) is read prismatically and in the light of art 8(1), the concepts of 'life' and 'personal liberty' housed in the former are found to contain in them other rights. Thus 'life' means more than mere animal existence and includes such rights as livelihood and the quality of life (see *Tan Tek Seng*'s case). And 'personal liberty' includes other rights such as the right to travel abroad ... B

See *Loh Wai Kong v Govt of Malaysia* [1978] 2 MLJ 175, where Gunn Chit Tuan J said that 'personal liberty' includes 'liberty to a person not only in the sense of not being incarcerated or restricted to live in any portion of the country but also includes the right to cross the frontiers in order to enter or leave the country when one so desires ... C

[62] Given the above, one is also mindful of the authorities cited therein, in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285 where the Federal Court approved the passage in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 which states that: D

The long and short of it is that a Constitution especially those article in it that confer on a citizen the most cherished of human rights must on no account be given a literal meaning. It should not be read as a last will and testament. If we do that then that is what it will become. E

[63] Although one is aware that exemplary damages or punitive damages are synonymous and stand apart from an award of compensatory damages (as expressed by Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29) they are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. F G

[64] Thus to label awards made by the court below as exemplary damages (although the judge termed it as such) does not really resolve the difficulty. In my view, the role of the court is to examine the award against the totality of the circumstances in which it was awarded, having regard to the conduct of the tortfeasor. H

[65] It is recognised that by the common law of England, the violation of a constitutional right entitles a court to make an award of damages that seeks to punish the tortfeasor defendant. Lord Devlin held this to be so in *Rookes v Barnard*, where His Lordship said: I

... there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought

A logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not
B compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

The first category is *oppressive, arbitrary or unconstitutional action by the servants of*
C *the government.* (Emphasis added.)

[66] Thus the basis for the award of exemplary damages for constitutional wrongs in the United Kingdom is the case of *Rookes v Barnard*, where the first limb recognises the ability to do so when there has been behaviour which is
D oppressive, arbitrary or unconstitutional action by the servants of the government.

[67] Clearly in the UK, the recourse to exemplary damages where there has been a constitutional wrong is well established and the provisions of their
E equivalent of the Civil Law Act has not in any manner deterred the ability to make such a claim.

[68] Although the restriction on the award of exemplary or aggravated damages imposed by *Rookes* has not been accepted by other common law
F jurisdictions including the United States, the question of whether we should depart from it or instead follow the Canadian and Australian courts is one which must await an answer upon another occasion.

G **[69]** What is important in this appeal is that, once it is accepted that by the common law of England a victim of a constitutional violation has the right to be compensated by an award of punitive, exemplary or aggravated damages, that in itself translates into a right guaranteed under art 5(1) of the Federal Constitution which for ease of reference is once again illustrated below, where
H it reads:

No person shall be deprived of his life or personal liberty *save in accordance with law*. (Emphasis added.)

[70] This court had recently held, in *Public Prosecutor v Gan Boon Aun*
I [2017] 3 MLJ 12, that the phrase 'in accordance with law' assumes critical importance when one considers it in its context. This court held that:

Pertinent to 'law' in the phrase 'in accordance with law', art 160(2) of the Federal Constitution stipulates that 'Law includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage

having the force of law in the Federation or any part thereof', with that common law being the common law of England (see art 160(2) of the Federal Constitution read with s 66 of the Interpretation Acts 1948 and 1967). Article 160(2) uses the word 'includes'. Hence, art 160(2) is a non-exhaustive definition. The phrase 'in accordance with law' does not merely refer to domestic law but also to the rule of law (see *R v Lambert* [2001] UKHL 37 at para 150 per Lord Clyde), it includes the doctrine of presumption of innocence, and does not exclude case law, judge made law, legal doctrines established by judicial precedents, or whatever that has the force of law (per Jeffrey Tan FCJ).

[71] Accordingly, where a wrong is committed by the state or an instrument of the state which has the effect of depriving the victim of his life (in the widest sense as held by this court in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, *in a manner not in accordance with law*, *the victim is entitled to an award of exemplary or aggravated damages*). Thus as in this appeal, the Respondent is entitled as a matter of right guaranteed to them by the Constitution, to exemplary or aggravated damages for the deprivation of the deceased's (Kugan's) life. (Emphasis added.)

[72] Which brings me to the next stage. The appellants argue that an award of exemplary damages is barred by sub-s 8(2) of the CLA (see para 28). I have stated that in my view s 8 is inapplicable in Kugan's case which relates to a custodial death arising by reason of the breach of a constitutional right. Notwithstanding this, an alternative interpretative approach yields the same answer.

[73] As had been alluded to above, the Civil Law Act 1956 predates the Federal Constitution. Thus it is a pre-Merdeka law or an existing law. It is clear that the section violates the right of the deceased (Kugan) in this case to have, as a matter of constitutional guarantee, an award of exemplary or aggravated damages. Being a pre-Merdeka law and therefore an existing law that is inconsistent with a provision of the Constitution, the duty of this Court is to read it in accordance with art 162(6) of the Federal Constitution to bring it into accord with the latter.

[74] Article 162(6) reads as follows:

Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under the Article or otherwise may apply it *with such modification as may be necessary to bring it into accord with the provisions of this Constitution*. (Emphasis added.)

[75] Thus the function of a court in applying that provision was reflected in cases such as the Court of Appeal decision of *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289, where the court held that:

41. How then do you modify s 12 to render it harmonious with art 13(2)? I think you do that by reading the relevant phrase in s 12 as 'the State Authority shall grant adequate compensation therefor'. By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete. I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence to do this. But here you have 'a direction by the supreme law of the Federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation'.

[76] A not dissimilar approach was taken in *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30. In that case, the former Federal Court was concerned with the validity of the Restricted Residence Enactment (Cap 39 of the Laws of the Federated Malay States).

[77] The task of the court in that case was much lighter than the one we face here. That is because the Enactment did not contain any provision that violated the fundamental rights prescribed under art 5 of the Federal Constitution. So the way in which the court carried out the modification was *to read the Enactment as being subject to those rights*. Suffian FJ made that quite clear in his judgment. He said:

> Answering the second part of the question posed, even assuming that the Enactment is inconsistent with the Constitution, I say that the Enactment is not void but that it must be applied with modifications to bring it into accord with the Constitution. To bring it into accord with the Constitution, *there must be read into the Enactment the constitutional rights conferred on an arrested person by art 5*. (Emphasis added.)

[78] Taking the above and acting upon the dictates of art 162(6), I would interpret sub-sub-s 8(2)(a) of the CLA as follows, to bring it into accord with the Federal Constitution.

It would thus read:

> Section 8(2)
>
> Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —
>
> (a) Shall not include any exemplary damages *save where the cause of action concerns the violation of a right guaranteed by the Federal Constitution*, any damages for bereavement made under subsection 7(3A), any damage for loss of expectation of life and any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;

[79] By reading into para (a) of sub-s 8(2) the emphasised words, the section is brought into accord with the Federal Constitution.

[80] For the reasons above, it is my judgment that sub-s 8(2) should be disapplied to a claim for damages by the estate of a deceased for the violation of the rights guaranteed by art 5(1) of the Federal Constitution read in its widest sense.

[81] It is therefore clear where the justice of this appeal lies.

As the House of Lords said in *Kuddus*'s case the nature of the appellant's conduct calls for a further response from the courts. Conscious wrongdoing by the appellant is outrageous and the latter's disregard for the respondent's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour.

[82] The basic premise of the fundamental rights in our Federal Constitution is universal and requires no further explanation. Custodial death should never ever become a new normal; for something is seriously wrong with a society which does not find senseless loss of lives abhorrent.

[83] This appeal brings home the point that the appellant's exercise of power should always be subordinate to their duty of service.

[84] As Lord Nicholls said in *Kuddus v Chief Constable of Leicestershire Constabulary*, '... the availability of exemplary damages has played a significant role in buttressing civil liberties ... and that exemplary damages, as a remedy of last resort, fill what would otherwise be a regrettable lacuna'.

[85] In view of the above, my answer to question No (2) is in the negative, unless it is modified as stated aforesaid.

Consequently, in view of the above, the answer to question No (3) is self-evident and need not be answered as I agree with the majority.

[86] Therefore this appeal (01–36–5 of 2015(W) Appeal No 52) is partially dismissed as indicated above. As question (2) is answered in the negative, the decision of the Court of Appeal on damages is restored, though based on different grounds.

Zaharah Ibrahim FCJ (delivering majority judgment of the court):

INTRODUCTION

[87] These three appeals arose from three separate cases heard at first instance before three different judges of the High Court.

A **[88]** Different panels of the Court of Appeal heard the respective appeals against the decisions of the High Court.

[89] Applications for leave to appeal against the decisions of the Court of Appeal were heard and allowed by three different panels of this court. The
B questions of law for which leave was granted relate to ss 7 and 8 of the Civil Law Act 1956 ('the CLA').

[90] In view of the similarities of facts and issues in the three appeals, the three appeals were heard together before the same panel of this court.
C

Appeal No 01(f)-36–05 of 2015(W)

[91] Appeal No 01(f)-36–05 of 2015(W) ('Appeal No 36') is an appeal by the appellants (who were the defendants in the High Court) against the
D decision of the Court of Appeal which allowed the appeal by the respondents (who were the plaintiffs in the High Court) against the decision of the High Court dismissing with costs the respondents' claim for damages for loss of dependency, and for exemplary and aggravated damages.

E

Appeal No 01(i)-52–10 of 2015(W)

[92] Appeal No 01(i)-52–10 of 2015(W) ('Appeal No 52') is an appeal by the appellants (who were the defendants in the High Court) against the
F decision of the Court of Appeal which allowed the appeal by the respondent in part against the decision of the High Court allowing the claim by the respondent (who was the plaintiff in the High Court) for, among others, damages for false imprisonment and misfeasance in public office and exemplary damages.

G

[93] The Court of Appeal, in allowing the appellants' appeal in part, ordered that the award of damages for false imprisonment be set aside. The other damages awarded by the High Court were affirmed.

H

[94] The Court of Appeal also allowed the appeal by the second defendant (who is not a party to the appeal before us) and reduced his liability to 45%.

Appeal No 01(f)-53–10 of 2015(W)

I

[95] Appeal No 01(f)-53–10 of 2015(W) ('Appeal No 53') is an appeal by the appellants (who were the defendants in the High Court) against the decision of the Court of Appeal which allowed the appeal by the appellants in part against the decision of the High Court allowing the claim by the

respondent (who was the plaintiff in the High Court) for, among others, loss of support, general damages and exemplary damages.

[96] The Court of Appeal, in allowing the appellants' appeal in part, set aside the award for exemplary damages, reduced the quantum of damages for dependency claim, but affirmed the award for general damages for pain and suffering.

BACKGROUND FACTS

Appeal No 36

[97] The respondents in this appeal are the three children of Abdul Jaafar bin Abd Mutalib ('Jaafar') who died on 2 September 2008.

[98] The third appellant (ASP Ong Seng Keong) was the head of the police team which was carrying out routine patrol in Section 13, Shah Alam, in the early morning of 2 September 2008. He and his team members saw two cars: one was a Proton Waja and the other a black Proton Perdana.

[99] Their suspicion being aroused, the third appellant and his team began tailing both cars from the Shah Alam Stadium through the Kayangan roundabout and onto the Federal Highway heading towards Kuala Lumpur.

[100] During their surveillance, the police team noticed that the two cars slowed down each time they neared a petrol station. There were three petrol stations in all along the route taken by the two cars.

[101] When the two cars circled back to the Shah Alam Stadium, the police team stopped both vehicles.

[102] After the two cars had stopped, the third appellant approached the Proton Waja and identified himself as a police officer. He suddenly heard gunshots and at the same time he heard SM Kamal Hisham bin Abdul Samad, a member of his team, scream 'Tuan, dia tembak'.

[103] The third appellant immediately directed his team to open fire. Jaafar, who was seated in the front passenger seat of the Proton Waja, was shot six times by the team. Jaafar and the three others in that car were killed.

Appeal No 52

[104] In this case, Kugan a/l Ananthan ('Kugan') was arrested on 14 January 2009. The police obtained a remand order from the magistrates' court at

Petaling Jaya for a period of seven days from 15–21 January 2009. He was detained at the Taipan Police Station lock-up.

[105] On 20 January 2009, around 11.40pm, the second defendant, Navindran a/l Vivekanandan informed one of the officers on duty on that day that Kugan had vomited after drinking mineral water.

[106] The second defendant was asked to get medical assistance from one Dr Baldev Singh from Mediviron Clinic, Subang Jaya. When the doctor arrived around 11.50pm, he found that Kugan was in a bad condition. He was motionless. Kugan was pronounced dead around 11.50pm.

[107] Kugan's body was taken to Serdang Hospital for post-mortem examination. The first post-mortem examination report by Dr Abdul Karim bin Hj Tajudin from Serdang Hospital stated that the cause of death was 'pulmonary edema' related to 'an abnormal build-up of fluid in the sacs of the lungs, which leads to shortness of breath'. The report also mentioned that 22 categories of external wounds were found on Kugan's body.

[108] Kugan's family commissioned a second post-mortem examination, which was conducted by Dr Prashant N Samberkar from the University of Malaya's Medical Centre. Dr Prashant's report stated that there were 45 categories of external injuries on Kugan's body and a wide range of internal injuries. The cause of death was stated as 'acute renal failure due to the rhabdomyolysis due to blunt trauma to skeletal muscles'.

[109] An investigation was carried out. The injuries to Kugan were found to have been committed by the second defendant. The second defendant was charged under the Penal Code, found guilty and convicted. He was sentenced to imprisonment for a term of three years.

Appeal No 53

[110] In this case, Uthayachandran a/l Gaur Chandram ('Uthayachandran') was remanded from 14 February 2007 in the Sungai Buloh Prison pending trial for a charge under s 39B(2) of the Dangerous Drugs Act 1952.

[111] On 18 May 2008, a fight broke out amongst several prisoners during the distribution of food. As a consequence of the fight, Uthayachandran sustained severe injuries.

[112] The warden on duty took Uthayachandran to the prison clinic for treatment. However, due to his severe injuries, Uthayachandran was taken to Sungai Buloh Hospital for further treatment. Later at the hospital, he was pronounced dead.

[113] The prisoners who were involved in the fight were charged at the Shah Alam High Court and sentenced accordingly after being found guilty and convicted of the charges against them.

AT THE HIGH COURT

Appeal No 36

[114] On 20 April 2011, the respondents, through their mother, filed this action for damages for loss of dependency under s 7 of the CLA. In addition, the respondents also claimed aggravated damages and exemplary damages.

[115] The respondents claimed that their father ('Jaafar') was unlawfully shot dead by the police team. The evidence showed that Jaafar never shot at the police team and therefore the police team's contention that they shot the persons in the Proton Waja in self-defence was not supported by evidence.

[116] At the conclusion of the full hearing, the High Court dismissed the respondents' claim with costs. The High Court held that the police team was acting in self-defence when they opened fire after the deceased had shot at them. As such the police team was protected by s 24 of the Police Act 1967.

[117] The respondents appealed against that decision to the Court of Appeal.

Appeal No 52

[118] The respondent, who is Kugan's mother and the administratrix of his estate and also his dependant, filed Civil Suit No 21NCVC-7–01 of 2012 claiming for damages against the appellants as well as Navindran (the second defendant) for negligence and/or breach of statutory duties resulting in the death of the deceased when the deceased was under police detention.

[119] The respondent claimed under s 7 of the CLA for loss of support. The respondent's claim was also based on s 8 of the CLA for the benefit of the estate of the deceased. She claimed damages for misfeasance in public office, assault and battery, and false imprisonment and for aggravated damages, exemplary damages, vindicatory damages and special damages.

[120] At the conclusion of the hearing, the High Court allowed the respondent's claim and awarded a total of RM801,700 as damages including the sum of RM100,000 for misfeasance in public office and the sum of RM300,000 as exemplary damages.

[121] The appellants appealed against that decision to the Court of Appeal.

Appeal No 53

[122] The respondent, who is Uthayachandran's father, filed Civil Suit No S21–153 of 2009 on 1 June 2009 under s 7 of the CLA.

[123] The essence of the respondent's claim is that the appellants had failed in their duty to ensure Uthayachandran's safety whilst in their custody. The respondent contended that he and his family suffered anxiety, injury to feelings and bereavement due to the acts, defaults and omissions of the appellants.

[124] The respondent sought damages for loss of support, as well as general damages for pain and suffering arising from the loss of his son, and exemplary damages.

[125] The High Court allowed the respondent's claim and awarded damages in the sum of RM192,000 for the dependency claim, the sum of RM100,000 as general damages (for pain and suffering arising from the respondent's loss of his son) and the sum of RM100,000 as exemplary damages.

[126] The appellants appealed against that decision to the Court of Appeal.

AT THE COURT OF APPEAL

Appeal 36

[127] The Court of Appeal, after hearing the parties, allowed the respondents' appeal and ruled that the judgment of the High Court showed error of law of a grave nature which required the Court of Appeal to intervene.

[128] The Court of Appeal held that there was nothing in the grounds of judgment of the High Court that stated that the appellants had discharged their burden of proving self-defence.

The learned trial judge had also not considered whether s 24 of the Police Act 1967 relied upon by the appellants entitled the police team to use excessive force and kill Jaafar.

[129] The Court of Appeal awarded damages in the sum of RM51,000 for the respondents' dependency claim. The court also awarded exemplary damages in the sum of RM300,000.

[130] In granting the claim for exemplary damages, the Court of Appeal held that exemplary damages are permissible when a complaint is related to breach of fundamental guarantee under the Federal Constitution. The Court of Appeal said:

(i) The House of Lords as early as 1964 in *Rookes v Barnard* [1964] AC 1129 has held that English courts have recognised the awarding of exemplary damages, that is, damages whose object was to punish or deter and which were distinct from aggravated damages (whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into account in assessing compensatory damages), and there were two categories in which an award of exemplary damages could serve as a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government, in the case where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff (see *Sakshi Sharma w/o Rajesh Sharma and others v State of Himachal Pradesh and others* [2012] Indlaw HP 1474). The Indian courts have been cautious in granting exemplary damages in ordinary tort claims. In *Common Cause v Union of India* [1999] 6 SCC 667 it was stated:

> In an action for tort where the plaintiff is found entitled to damages, the matter should not be stretched too far to punish the defendant by awarding exemplary damages except when their conduct, specially those of the government and its officers, is found to be oppressive, obnoxious and arbitrary and is, sometimes coupled with malice ... If we were to apply the rule in *Rookes v Barnard* [1964] 1 All ER 367 invariably and unhesitatingly and were to award exemplary damages in every case involving government officers or government servants, the result would be appalling.

(j) The reason for awarding exemplary damages was addressed in *Rookes v Barnard* as follows:

> There are certain categories of cases in which the award of exemplary damages can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to criminal.

(k) In essence, English and Indian case laws recognises that courts on extraordinary facts and circumstances to maintain social discipline and rule of law must take punitive measures by awarding damages for unlawful act. The English courts in the recent case of *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 (HL) have gone to say that exemplary damages which is statutorily barred in tortuous claim by virtue of English Law Reform (Miscellaneous Provisions) 1934 (Act 26), is maintainable if the claim is premised on breach of fundamental guarantees enshrined in the Federal Constitution. This part of the jurisprudence is well captured and articulated by His Lordship David Wong Dak Wah in the case of

A *Datuk Seri Khalid bin Abu Bakar & ors v N lndra a/p Nallathamby* (W-01(NCVC)(W)-263–07 of 2013, often referred to *Kugan*'s case High Court citation [2013] 6 CLJ 272).

(l) The Indian Supreme Court even before *Ashley*'s case have made it clear that a breach of fundamental guarantees under the Constitution will attract exemplary damages as of right, independent of tortuous claim (see *K Elango and others v Secretary of State of Tamil Nadu and others* [2013] Indlaw Mad 1425).

...

(o) From the reading of Indian Supreme Court decision as well as the House of Lords (PC) decision in *Ashley*'s, it is trite that courts as guardian of the Constitution are bound to arrest any form of breach of fundamental guarantees by providing exemplary damages as a tool for relief which has been extracted and extended from the decision in *Rookes v Barnard*. In consequence, a bar to claim exemplary damages under Civil Law Act in private law remedy will not apply in the arena of public law relief as well as remedy.

(q) We would have been minded to award the sum of RM1m if the plaintiffs had led evidence to justify the quantum. Taking into consideration the allegation of the state, we take the view it will be more appropriate to award quantum for exemplary damages of RM300,000 as was given in the case of *Kugan*.

Appeal No 52

[131] At the Court of Appeal, the appellants' appeal in this appeal was only in relation to the damages for false imprisonment and misfeasance in public office and exemplary damages. The Appellants contended as they did in the High Court, that there is nothing in s 7 or s 8 of the CLA that suggests a claim can be made for damages for the tort of misfeasance in public office. As for the claim for exemplary damages, the appellants submitted that sub-s 8(2) of the CLA clearly disallows such damages.

[132] Only the second defendant appealed against the finding of liability by the High Court.

[133] After having heard the parties, the Court of Appeal allowed the appeal by the appellants in part and ordered that the award for false imprisonment be set aside. The Court of Appeal however affirmed the rest of the award.

[134] As for the second defendant's appeal, the Court of Appeal allowed the appeal and reduced the liability of the second defendant to 45%.

[135] On the issue of misfeasance in public office, the Court of Appeal held as follows:

58. From what we have stated above, we find that the learned judge's findings were based on established evidence and are far from perverse. Common sense and

common decency demand that a full public inquiry be initiated which would have served both the private and public interests in a manner demanded in a civil society. That said we find that the use of the phrase 'cover up' by the learned judge to be inappropriate as it implies a criminal intent where in this case we find none on the part of the first and third defendants. We find however that the judge's findings do lead to the irrefutable conclusion that the first, second and third defendants had breached their duty of care to the deceased.

59. In summary, we say that this willful disregard to ensure that the truth behind the death of the deceased is made known together with other disputed evidence set out above are enough to satisfy a case of public misfeasance. It is also our view that there has been reckless indifference to the illegal act of the second defendant. We further find that the evidence proffered by the defendants had not rebutted the evidence set out above by us and that of the learned judge. In other words, the conduct of the defendants fell far short of the SOP which we say must require more disclosure than what had happened in this case.

[136] On the issue of exemplary damages, the Court of Appeal said:

74. That said, we see no reason why we should not adopt the approach of the House of Lords in the circumstances of this case. Accordingly we find that where there is a breach of a constitutional right by a public authority, s 8(2) of the Civil Law Act does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.

75. We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law act was enacted, it was only in respect of private tortious actions. Hence we are of the view that s 8 of the Civil Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages.

76. There is another reason for our decision. In Malaysia, we do not have an ombudsman or an Independent Police Complaint and Misconduct Commission despite the recommendation of a Royal Commission for Police Reform (2005). In the case before us, the intention of the plaintiff is clear and that is to hold the defendants responsible and accountable for their unlawful action as public officers. It is not just a case of merely being compensated, it is more and that is to ensure that the public officials who are supposed to be the guardians of the Constitution are brought to task and that such unlawful actions should not happen again. Remand prisoners are innocent until convicted in a court of law and like other citizens they are entitled to their basic human rights during their lawful detention ...

77. As to whether exemplary damages should be awarded, we see no clearer case as in this case where it must be given to reflect the severity of the breach ... Any reasonable tribunal in our view would conclude that this is an appropriate case to award exemplary damages. Not to award such exemplary damages would in our mind be 'not attending to the mutilation with the appropriate care'.

78. As for the quantum of the exemplary damages, there is also no reason to disturb the award granted by the learned judge as it commensurate with the actions of the defendants.

[137] In dealing with the issue of misfeasance in public office, the Court of Appeal found that the second defendant could not have been responsible for the acts after Kugan's death. The Court of Appeal also noted that the High Court had failed to consider the involvement of other police officers in the events leading to Kugan's death and these officers had, as admitted by the appellants, been assigned to desk duties as a form of punishment.

Appeal No 53

[138] Aggrieved by the decision of the High Court, the appellants in this appeal appealed to the Court of Appeal in respect of the awards for dependency claim (RM192,000), general damages (RM100,000) and exemplary damages (RM100,000).

[139] The Court of Appeal reduced the amount awarded for dependency claim and set aside the award for exemplary damages. These do not relate to the appeal before us.

[140] In relation to the award for general damages, the appellants submitted before the Court of Appeal that the general damages awarded to the plaintiff (for pain and suffering arising from the loss of his son, Uthayachandran) were not claimable and not provided for under s 7 of the CLA. Hence, the learned judge erred in law in ordering such general damages to be paid.

[141] The Court of Appeal, however, affirmed the award of general damages. The Court of Appeal held as follows:

> [34] ... Adalah fakta yang tidak dapat dipertikaikan bahawa dengan kematian simati telah terputus hubungan kasih sayang 'bapa–anak' antara plaintif dan simati. Tidak syak lagi plaintif akan mengalami 'pain and suffering, loss of 'consortium' (?), bereavement and trauma'. Ini adalah tindak balas emosional biasa dan dijangkakan akibat dari kematian anaknya tersebut. Perlu diambil perhatian bahawa ganti rugi yang dituntut ini tidak mempunyai apa-apa kaitan dengan kehilangan faedah yang selama ini telah dinikmati oleh plaintif tetapi adalah berkaitan dengan isu untuk mendapatkan pampasan terhadap perasaan sedih, dukacita, sugul, kehilangan dan terputusnya kasih sayang akibat dari kematian orang tersayang secara mengejut.
>
> ...
>
> [36] Pada hemat kami, ganti rugi am sebanyak RM100,000 yang diawardkan oleh hakim bicara bijaksana adalah agak tinggi. Walau bagaimanapun, ia tidaklah merupakan satu amaun yang berlebihan atau melampau (*manifestly excessive*) yang memerlukan campurtangan kami. Pengawardan ganti rugi adalah merupakan budi bicara hakim bicara dan beliau adalah tidak terikat kepada kaedah atau peraturan tetap tertentu dan keputusan dalam kes-kes lain hanya merupakan panduan semata-mata ...

[37] Kami telah memberi pertimbangan mendalam terhadap tuntutan gantirugi ini dan pada pandangan kami demi keadilan dan dalam melaksanakan budi bicara kehakiman adalah wajar hakim bicara bijaksana mengawardkan ganti rugi am sebanyak RM100,000 tersebut.

AT THE FEDERAL COURT

Leave questions

[142] The appellants applied to this court for leave to appeal against the decisions of the Court of Appeal in all three cases. Leave was granted on one question of law for Appeal No 36 and one for Appeal No 53. For Appeal No 52 leave was granted for three questions of law. However, at the commencement of learned senior federal counsel's submissions before us during the hearing of the appeals, the third question was withdrawn. We will set out the questions as we deal with them later.

SUBMISSIONS

Appeal No 36

Leave question

[143] The question of law ('leave question (1)') for which leave was granted for Appeal No 36 is:

(1) *Whether exemplary damages can be awarded in claims founded on section 7 of the Civil Law Act 1956?*

Submissions by the appellants

[144] Before us, it was submitted for the appellants that s 7 of the CLA creates a statutory cause of action. Hence any right to damages must only be that which is allowed under s 7. Section 7 has no provision allowing exemplary damages to be awarded for arbitrary, oppressive or unconstitutional acts of the tortfeasor.

[145] The appellants also submitted that the Court of Appeal erred in holding that exemplary damages could be awarded for breach of fundamental guarantees under the Federal Constitution by relying on Indian authorities. According to the appellants the Indian cases were decided based on provisions in the Indian Constitution for which there are no corresponding provisions in the Federal Constitution.

A Submissions by the respondents

[146] The respondents submitted that although exemplary damages are precluded under the CLA, they can still be awarded where the claim is founded upon a breach of fundamental guarantee under the Federal Constitution. It
B was the appellants who caused the death of the deceased, and consequently breached his constitutional rights under art 5 of the Federal Constitution.

Appeal No 52

C Leave questions

[147] The questions of law ('leave questions (2) and (3)') for which leave was granted for Appeal No 52 and are not withdrawn are:

D (2) *Whether s 8(2) of the Civil Law Act 1956 (Act 67) which bars the awarding of exemplary damages in an estate claim is applicable where the death of the deceased is as a result of a breach of his constitutional right to life;* and

(3) *For the purpose of an estate claim under s 8 of the Civil Law Act 1956 (Act 67), whether the acts that make up the tort of misfeasance in public office must be the acts that occurred before the death of the deceased.*

E

Submissions by the appellants

[148] In relation to leave question (2), the appellants submitted before us
F that the clear provisions of sub-s 8(2) of the CLA can admit of only one meaning: that exemplary damages are not recoverable in an estate claim, with no exceptions. Hence, it was not open to the court to rewrite the words of a statute or ignore the express statutory provisions.

G **[149]** Learned federal counsel submitted that at common law a person's death does not give rise to a cause of action in favour of dependants and does not recognise any claim by representatives of the estate of the deceased whose death was caused by the tortfeasor against the tortfeasor. The common law position was mitigated by statutory reforms in England and those statutory
H provisions were incorporated into ss 7 and 8 of the CLA. Section 8 allows a cause of action which would otherwise 'die' with the deceased to survive for the benefit of his estate.

[150] The appellants further submitted that the Court of Appeal erred in
I awarding exemplary damages for breach of constitutional right, despite the clear words of sub-s 8(2) of the CLA, by relying on three decisions from other jurisdictions, namely:

(a) *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 ('Ramanoop');

(b) *Merson v Cartwright and Another* [2006] 3 LRC 264 ('Merson'); and

(c) *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 ('Ashley').

[151] Learned senior federal counsel submitted, for the appellants, that the Court of Appeal's reliance on the three cases was misplaced as *Ramanoop* and *Merson* deal with breach of constitutional rights for which the Constitution of Trinidad and Tobago and the Constitution of the Bahamas, respectively, grant jurisdiction to award remedies for infringement of constitutional rights. Similar provisions do not exist in the Federal Constitution. In *Ashley*, a claim was made for damages for several alleged tortious acts, including negligence and false imprisonment. The decision in that case was in respect of an application to strike out remaining causes of action upon an admission of liability and agreement to have damages assessed only for negligence and false imprisonment. The House of Lords dismissed the application for striking out. Hence, according learned senior federal counsel, what was said by Lord Scott in that case on vindicatory damages being the appropriate damages when duties have been breached was merely obiter.

[152] As regards leave question (3), it was submitted by learned senior federal counsel, that acts occurring after the death of the deceased do not give rise to causes of action which vest in the deceased and survive for the benefit of the estate in a claim brought under s 8(2) of the CLA. Hence, argued learned senior federal counsel, the award of damages of RM100,000 for misfeasance in public office which had taken into account acts occurring post-death must be reduced to RM50,000, being a fair and reasonable amount for acts committed against the deceased before his death.

Submissions by the respondent

[153] For leave question (2), the respondent submitted that the Court of Appeal was correct in its interpretation of s 8 of the CLA that the proviso does not prohibit the courts from awarding exemplary damages for breach of constitutional rights by a public authority.

[154] The respondent submitted that the Court of Appeal was correct when it held that s 8 of the CLA is a pre-Merdeka law and therefore should be interpreted in a manner that does not prohibit the courts from awarding exemplary damages for breach of constitutional rights.

[155] The respondent also submitted that the Court of Appeal had rightly exercised its power pursuant to art 162 of the Federal Constitution in order to give a harmonious construction between s 8 of the CLA and the Federal Constitution. According to the respondent, the Court of Appeal correctly held that the restriction on exemplary damages in s 8 should be restricted to private

A tort claims and ought not to apply to breaches of constitutional rights and public intentional torts such as misfeasance in public office. It would lead to absurd and unjust outcomes, argued the respondent, if s 8 of the CLA were to be applied without any modification.

B **[156]** For leave question (3), the respondent submitted that the further acts and omissions of the appellants after the death of the deceased were simply a continuum of the misfeasance prior to his death. It was submitted that it would be wholly artificial to treat those acts and omissions post death as a separate public misfeasance tort when they all stem from the death in custody of the C deceased. Hence, according to the respondent, the argument of the appellants that some of the acts were post-death and the award should be reduced to RM50,000 is without basis.

D **[157]** Therefore, submitted the respondent, the Court of Appeal was right to award exemplary damages and damages for the tort of misfeasance in public office.

Appeal No 53

E

Leave question

[158] The question of law (which we will refer to as leave question (4) after this) for which leave was granted for Appeal No 53 is:

F (4) *Whether general damages for pain and suffering can be awarded to a Plaintiff in a dependency claim brought under s 7 of the Civil Law Act 1956*?

Submissions by the appellants

G **[159]** The appellants submitted that from the clear provisions of s 7 of the CLA, a dependant can only claim the following:

(a) damages for loss of support;

H (b) reasonable expenses incurred resulting from the death;

(c) funeral expenses; and

(d) damages for bereavement.

I **[160]** There is clearly no provision to enable an award to be made in favour of a dependant for pain and suffering. Hence, in awarding the sum of RM100,000 for pain and suffering to the respondent the Court of Appeal had introduced an additional item of compensation which is not within the contemplation of the legislature in enacting s 7 of the CLA.

Submissions by the respondent

[161] The respondent submitted that the fact that death occurred as a result of the appellants' wrongful acts means that the court can award damages for pain and suffering.

[162] The respondent submitted that sub-s 7(3) of the CLA states what the general objective of damages for dependants is. They are to compensate the dependants for 'any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default'.

[163] The respondent further submitted that the learned judge had exercised reasonable judicial discretion when arriving at the decision after having considered the fact that the respondent's son's death was caused by the appellants' weakness and negligence.

[164] Hence, contended the respondent, the learned judge had not erred in law when the learned judge awarded general damages in the sum of RM100,000 for pain and suffering.

OUR ANALYSIS

The law

[165] As submitted by learned senior federal counsel, at common law, the death of a person is not considered an injury and personal actions do not survive the death of the injured person, nor can any claim be brought consequent to such death. This position was mitigated by statutory provisions in England and similar statutory provisions were incorporated into various statutes in this country.

[166] The CLA, which consolidates the provisions of the various statutes, incorporates those statutory provisions in Part III of the Act.

[167] When tabling the Civil Law Bill for its second reading on 15 May 1956, the attorney general said, in relation to Part III of the Bill:

> The second point is with regard to Part III of the Bill which deals with the law relating to fatal accidents and the survival of causes of action. I do not think it is necessary to say very much about that. The English common law, in the days of its rigour, made no provision at all for the survival of a right of action when a person dies. You could not get compensation for the death of another, and it followed that if you must knock someone down in the streets, it would be much better actually to kill him outright rather than to injure him ... They have amended the law in England on that point and we have amended our law many years ago in the

A Federated Malay States and in the Settlements to enable actions to be brought on behalf of dependants for the loss they suffer as a result of the death of a person on whom they were dependent. And also actions now may be brought by a personal representative, who is able to claim those damages which the dead person would have been able to claim if he had not been dead. Among the other results of that B amendment is that it is now common to claim damages for loss of expectation of life and the Judges have been presented with the task over the last 10–15 years, in England and here, of trying to assess how much a life is really worth. The result in each case seems to depend very much on the views taken by the Judge on the value of his own life.

C

[168] This court in *Sambu Pernas Construction & Anor v Pitchakkaran* [1982] 1 MLJ 269 ('Sambu Pernas') explained the legal position with regard to ss 7 and 8 of the CLA as follows:

D At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary losses or damages to the deceased's spouse and children. Lord Ellenborough CJ in *Baker v Bolton* ruled that 'in a civil court the death of a human being could not be complained of as an injury'. The second principle was that when a person died any cause of action which was vested either in E his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: 'actio personalis moritur cum persona'. The first principle which regarded death as not giving rise to any cause of action was rectified by s 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival F of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in ss 7 and 8 of our Civil Law Act 1956.

Had it not been for ss 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and G in particular s 7, his case must stand and fall on the basis of these sections.

[169] In other words, as the right of the dependants of a deceased person and the estate of a deceased person to claim for damages is conferred by statute, that claim must be determined strictly within the confines of the statute.

H

[170] Part III of the CLA is reproduced in full below:

PART III

FATAL ACCIDENTS AND SURVIVAL OF CAUSES OF ACTION

I 7 Compensation to the family of a person for loss occasioned by his death

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action

for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].

(2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.

(3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

Provided that —

(i) in assessing the damages there shall not be taken into account —

(a) any sum paid or payable on the death of the person deceased under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

(b) any sum payable, as a result of the death, under any written law relating to employees' provident fund;

(c) any pension or gratuity, which has been or will or may be paid as a result of the death; or

(d) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever, in respect of the death;

(ii) damages may be awarded in respect of the funeral expenses of the person deceased if such expenses have been incurred by the party for whose benefit the action is brought;

(iii) no damages shall be awarded to a parent on the ground only of his having been deprived of the services of a child; and no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife; and

(iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall —

(a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration; and in the case of any other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was in good health but for the injury that caused his death and was receiving earnings by his own labour or other gainful activity prior to his death;

(b) take into account only the amount relating to the earnings as aforesaid and the Court shall not take into account any prospect of the earnings as aforesaid being increased at any period after the person's death;

(c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death;

(d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

(3A) An action under this section may consist of or include a claim for damages for bereavement and, subject to subsection (3D) the sum to be awarded as damages under this subsection shall be ten thousand ringgit.

(3B) A claim for damages for bereavement shall only be for the benefit —

(a) of the spouse of the person deceased; and

(b) where the person deceased was a minor and never married, of his parents.

(3C) Where there is a claim for damages under paragraph (3B)(b) for the benefit of the parents of the person deceased, the sum awarded shall be divided equally between them subject to any deduction likely to be made in respect of all costs and expenses including costs not recovered from the defendant.

(3D) The Yang di-Pertuan Agong may from time to time by order published in the *Gazette* vary the sum specified in subsection (3A).

(3E) An order made under subsection (3D) shall be published in the *Gazette* and as soon as possible thereafter, shall be laid before the Dewan Rakyat; and if the Dewan Rakyat passes a resolution annulling the order, it shall be void but without prejudice to the validity of anything previously done thereunder or to the making of a new order as from the date of notification in the *Gazette* of the passing of the resolution.

(4) The amount, other than the amount awarded under proviso (iii) to subsection (3) and the amount recovered under paragraph (3B)(b), so recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them in such shares as the Court by its judgment or decree directs.

(5) Not more than one action shall be brought for and in respect of the same subject matter of complaint, and every such action shall be brought within three years after the death of the person deceased.

(6) In any such action the executor of the deceased may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect, or default, which sum when recovered shall be deemed part of the assets of the estate of the deceased.

(7) The plaint or writ or summons in any such action shall give full particulars of the person or persons for whom or on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

(8) If there is no executor of the person deceased or there being an executor no action as in this section mentioned has, within six calendar months after the death of the person deceased, been brought by the executor, the action may be brought by all or any of the persons, if more than one, for whose benefit the action would have been brought if it had been brought by the executor, and every action so to be brought shall be for the benefit of the same person or persons and shall be subject to the same procedure as nearly as may be as if it was brought by the executor.

(9) It shall be sufficient for any defendant in any action brought under this section to pay any money, he is advised to pay into Court as a compensation, in one sum to all persons entitled under this section for his wrongful act, neglect or default without specifying the shares into which it is to be divided.

(10) If the said sum is not accepted and an issue is taken by the plaintiff as to its sufficiency and the Court thinks the same sufficient, the defendant shall be entitled to judgment upon that issue.

(11) In this section unless the context otherwise requires —

'child' includes son, daughter, grandson, granddaughter, stepson and stepdaughter;

'parent' includes father, mother, grandfather and grandmother;

'pension' includes a return of contributions and any payment of a lump sum in respect of a person's employment:

Provided that in deducing any relationship referred to in this subsection any illegitimate person or any person who has been adopted, or whose adoption has been registered, in accordance with any written law shall be treated as being or as having been the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

8. Effect of death on certain causes of action

(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to any claim for damages on the ground of adultery.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —

(a) shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;

A

(b) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

B

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either —

C

(a) were pending at the date of his death; or

(b) are taken not later than six months after his personal representative took out representation.

D

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

E

(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

F

G

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

H

Leave questions

I

[171] We shall deal with Appeal No 36 and Appeal No 53 first as the questions for which leave was granted in both appeals involve the same section, namely s 7 of the CLA.

Appeal No 36, leave question (1): Whether exemplary damages can be awarded in claims founded on s 7 of the Civil Law Act 1956? A

[172] We noted that the Court of Appeal in awarding exemplary damages had relied, among others, on *Ashley*'s case. Contrary to what is stated in the judgment of the Court of Appeal, the court in *Ashley* did not say that exemplary damages are maintainable. Lord Scott of Foscote in that case, in discussing the issue of whether further prosecution of the assault and battery claim should be barred, explained that the damages he was of the view ought to be awarded for breach of duties were 'vindicatory' damages. His Lordship said: B C

> In a later case, *Dunlea v A-G* [2000] 3 NZLR 136, Thomas J drew a distinction between damages which were loss-centred and damages which were rights-centred. Damages awarded for the purpose of vindication are essentially rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all. In *Ramanoop v A-G of Trinidad and Tobago* [2005] UKPC 15; [2005] LRC 301; [2006] 1 AC 328 the Privy Council upheld an award of vindicatory damages in respect of serious misbehaviour by a police officer towards the claimant. These were not exemplary damages; they were not awarded for any punitive purpose. They were awarded, as it was put in *Merson v Cartwright* [2005] UKPC 38; [2006] 3 LRC 264, another case in which the Privy Council upheld an award of vindicatory damages, in order 'to vindicate the right of the complainant ... to carry on his or her life in The Bahamas free from unjustified Executive interference, mistreatment or oppression. D E

[173] Section 7 of the CLA, which incorporates provisions as in the Fatal Accidents Acts of the United Kingdom, enables an action to be brought against a person whose wrongful act, neglect or default injured another and resulted in the death of the injured person if such wrongful act, neglect or default would have entitled the injured person to maintain such an action and recover damages in respect of such injury had the injured person not died. F G

[174] An action under s 7 can only be brought for the benefit of the wife, husband, parent or child ('specified dependants') of the person whose death was caused by that wrongful act, neglect or default. Such an action 'shall be brought by and in the name of the executor of the person deceased'. The executor may insert a claim for and recover any pecuniary loss to the estate of the deceased occasioned by the wrongful act, neglect or default and the recovered sum will form part of the estate of the deceased. H

[175] An action under s 7 is brought by the specified dependants and the estate of the deceased person in their own right. I

[176] An action brought under s 7 must be distinguished from an action brought under s 8 of the CLA. Section 8 deals with certain causes of action

which were already vested in the deceased person prior to his death and which he would have been able to pursue, but for his death. Those causes of action are not limited to causes of action arising from the wrongful act, neglect or default which resulted in his death. While at common law these causes of action would have died with him, under s 8 (which incorporates provisions as in the Law Reform (Miscellaneous Provisions) Act 1934 of the United Kingdom) those causes of action survive for the benefit of the deceased person's estate.

[177] In *Ashley*'s case, Lord Scott of Foscote explained the purpose of a claim under the UK Fatal Accidents Act as follows:

> ... The only legitimate purpose for which Fatal Accident Act damages can be claimed and awarded for this tort is, in my opinion, compensatory. The damages are awarded for a loss of dependency ...

[178] Subsection 7(3) of the CLA clearly specifies that damages which the person against whom the action is brought is liable to pay 'shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default'. The critical words are 'compensate' for 'loss of support'.

[179] The absence of a provision disallowing the grant of exemplary damages in s 7 must be viewed in the context of its compensatory nature and its difference from s 8. In *Rookes v Barnard and others* [1964] AC 1129, Lord Devlin said at p 1221: 'Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter'.

[180] An award of exemplary damages under s 7 is clearly contrary to the legislature's intention in enacting that section. The legislature obviously did not anticipate that such an award would be made. Hence, an express provision disallowing such an award is not required in s 7.

[181] Our answer to leave question (1) must therefore be in the negative.

Appeal No 53, leave question (4): Whether general damages for pain and suffering can be awarded to a plaintiff in a dependency claim brought under s 7 of the Civil Law Act 1956?

[182] As s 7 of the CLA is a provision enabling the specified dependants of a deceased person who came by his death due to the wrongful act, neglect or default of another to claim for damages in their own right to compensate them

for loss of support due to such death, a claim for the pain and suffering of the specified dependants (or even of the deceased person himself) is certainly beyond the purview of the section.

[183] In the case of *Davies and another v Powell Duffryn Associated Collieries, Limited* [1942] AC 601 quoted by learned counsel for the respondent, Lord Wright explained the nature of the remedy provided for in the UK Fatal Accidents Act as follows:

> The general nature of the remedy under the Fatal Accidents Acts has often been explained. These Acts 'provided a new cause of action and did not merely regulate or enlarge an old one', as Lord Sumner observed in *The Amerika*, at p 52. The claim is, in the words in the *Vera Cruz*, at p 101, for injuriously affecting the family of the deceased. It is not a claim which the deceased could have pursued in his own lifetime, because it is for damages not suffered by himself, but by his family after his death.
>
> ...
>
> ... There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities.

[184] Learned counsel for the respondent in Appeal No 53 also referred us to the cases of *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324, *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383; [1970] HC 60, and *Raja Mohktar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151 in support of his submission that claims are now allowed for nervous shock, loss of privacy and pure financial loss.

[185] *Ong Ah Long* and *Raja Mokhtar bin Raja Yaakob* are not cases brought under s 7 of the CLA. Those cases involve claims brought by the injured persons themselves who survived the accident. The Australian case of *Mount Isa Mines* (which was referred to by the Court of Appeal) involves a claim brought by a foreman at the mines who became depressed and developed mental illness as a consequence of seeing and helping his colleagues who had been injured by electrical short-circuit. Those colleagues died of the injuries. We do not think these cases are relevant to a claim under s 7 of the CLA.

[186] The proviso to sub-s 7(3) of the CLA does not allow damages to be awarded to a parent for being deprived of the services of a child or to a husband for having been deprived of the services or society of his wife.

[187] For loss other than pecuniary loss, the only damages that s 7 of the CLA allows to be claimed are damages for bereavement. However, such damages can only be awarded to the spouse of a deceased person or, if he was a minor and

never married, his parents. The sum that can be awarded as damages for bereavement is RM10,000, subject to the power of the Yang di-Pertuan Agong to vary such sum.

[188] Our answer to leave question (4) is therefore in the negative.

Appeal No 52

[189] We shall now deal with Appeal No 52. Leave was granted for questions (2) and (3) which relate to s 8 of the CLA.

Leave question (2): Whether s 8(2) of the Civil Law Act 1956 (Act 67) which bars the awarding of exemplary damages in an estate claim is applicable where the death of the deceased is as a result of a breach of his constitutional right to life?

[190] The bar referred to in leave question (2) is that provision of sub-s 8(2) of the CLA that provides that the damages that can be recovered for the benefit of the estate of a deceased person 'shall not include any exemplary damages'. The High Court and the Court of Appeal took the position that this bar does not apply where there has been a breach of one's fundamental liberty of right to life under the Constitution.

[191] As was explained by this court in *Sambu Pernas,* causes of action vested in a person survive his death solely due to s 8 of the CLA. Such survival is subject to the conditions set out in that section, one of which is that damages which can be awarded for the benefit of the estate of such deceased person cannot include exemplary damages. As was also stated in *Sambu Pernas*, the claim of a person claiming on behalf of the estate of a deceased person under s 8 must 'stand and fall' on the basis of that section.

[192] The High Court in this case relied on the High Court decision awarding exemplary damages for false imprisonment in the case of *Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368. Upon being referred to the judgment of the Court of Appeal which reversed the High Court decision, the learned High Court judge said:

> Therefore, from the close reading of the conclusion of the Court Appeal in *Borhan bin Hj Daud & Ors v Abd Malek bin Hussin* (Civil Appeal No W-01–122 of 2007), the Court of Appeal did not agree with the reasoning of the High Court, with respect, in respect of liability but nothing was said on the findings of the awards of damages which included *exemplary* damages or that the High Court has no power to award *exemplary* damages or damages for false imprisonment. The contention of learned senior federal counsel that the Court of Appeal has set aside the award of *exemplary* damages or damages of false imprisonment in accordance with his submissions that this court has no power to award *exemplary* damages cannot be

sustained and is a misreading of the judgment, and is misplaced. There is nothing in the grounds of judgment of the Court of Appeal to state directly or impliedly that the court cannot award *exemplary* damages or damages for false imprisonment or misfeasance when there is claim for dependency pursuant to s 7 or a claim under s 8 of the Civil Act 1956. At first sight it may be seen as if the court in awarding the *exemplary* damages but however on close reading, with respect, it does not appear to be and should not be read in that context or be read into the judgment as intended by the learned senior federal counsel. There was absolutely no finding or ratio decidendi of the judgment in the Court of Appeal to say that the award of *exemplary* damages is not allowed in law. In the circumstances, this court, with respect, would follow the reasoning of the High Court on the award of *exemplary* damages (*Abd Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 368 at pp 395–396).

[193] The Court of Appeal in their judgment quoted the above passage and said:

64. From the above passages, it can be seen that the learned judge had applied the common law to the factual matrix as he found them and seen fit not to be bound by the provision in s 8(2) in awarding exemplary damages. It would not be wrong to say that the learned judge saw the injustice which the deceased had suffered and justice dictated that an award of exemplary damages is required. The learned judge also relied on the judgment of *Borhan*'s case.

[194] Both the High Court and the Court of Appeal appeared to have overlooked the fact that *Borhan*'s case *was not* a case dealing with a claim under s 7 or 8 of the CLA. It stands to reason therefore that the Court of Appeal in *Borhan*'s case did not 'state directly or impliedly that the court cannot award *exemplary* damages or damages for false imprisonment or misfeasance when there is claim for dependency pursuant to s 7 or a claim under s 8 of the Civil Act 1956'. The claim in *Borhan*'s case was made by Abd Malek himself, the very person who claimed to have been falsely imprisoned, not by his executor for the benefit of his estate. We do not see how the decision in *Borhan*'s case can be relevant in a claim under s 8 of the CLA.

[195] After quoting the passage in the High Court's judgment dealing with *Borhan*'s case, the Court of Appeal proceeded to refer to arts 5 and 8 of the Federal Constitution and said:

68. In interpreting any statute, it is our considered view that the Courts must always be vigilant to any interpretation which may dilute the importance of any constitutional rights of citizens in this country. The significance of any breach of any basic rights provided for in the Federal Constitution cannot be viewed in the same manner as a breach of say 'traffic law' for the simple reason that there is no greater breach than that of a breach of a constitutional right. Further in this country we practise constitutional supremacy as opposed to parliamentary supremacy. Hence it is incumbent on the Courts when interpreting any statutes, resort must be made to the Federal Constitution when appropriate to do so [sic].

A 69. Such approach found favour in the case of *Ashley v Chief Constable of Sussex Police* [2008] 2 WLR 975 (HL) where the House of Lords dealt with provisions similar to that of s 8 of the Civil Law Act ...

...

B 72. From the grounds of Their Lordships, it is quite clear that they saw no impediment in awarding exemplary damages despite the express prohibition of awarding exemplary damages in an estate claim when they consider that prohibition in the light of fact that the claim of the Ashleys was for damages stemming from a breach of a right provided for in the Human Rights Act 1998 which Act is the consequence of the European Convention for the Protection of Human Rights and
C Fundamental Freedoms. His Lordship equated that statutory right to be a constitutional right by virtue of the connection or link between the Human Rights Act and European Convention for the Protection of Human Rights and Fundamental Freedoms. And such equation was done despite the fact that there is no written Constitution in England which practises Parliamentary supremacy.

D ...

74. That said, we see no reason why we should not adopt the approach of the House of Lords in the circumstances of this case. Accordingly we find that where there is a breach of a constitutional right by a public authority, s 8(2) of the Civil Law Act
E does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.

75. We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law Act was enacted, it was only
F in respect of private tortious actions. Hence we are of the view that s 8 of the Civil Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages.

[196] There appears to be some confusion as to the true position of the
G statement by Lord Scott of Foscote in *Ashley*. As we have mentioned above, at no time did Lord Scott advocate the award of exemplary damages. His Lordship was advocating (obiter, we must add) the award of *vindicatory damages* for breach of right.

H **[197]** The House of Lords in *Ashley* did not decide that vindicatory damages should be awarded. Their Lordships certainly made no decision on exemplary damages.

I **[198]** The House of Lords in *Ashley* was dealing with, in the words of Lord Scott himself, 'an interlocutory appeal in which Your Lordships must decide whether a civil case of assault and battery should be permitted to progress to trial'.

[199] Hence, we are of the view that the Court of Appeal and the High Court erred in treating Lord Scott's statement as a decision of the House of Lords permitting the grant of exemplary damages in a claim made under the UK Law Reform (Miscellaneous Provisions) Act. A

[200] We need to add that a nine member bench of the House of Lords in the case of *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 dealt at great length with the issue of vindicatory damages. The majority in that case did not think that the concept of vindicatory damages should be introduced into the law of tort, with Lord Dyson even equating such introduction as letting 'an unruly horse loose on our law'. B C

[201] We shall say no more as the appeals before us do not deal with vindicatory damages, and vindicatory damages although claimed in Appeal No 52 were not awarded by the High Court. D

There was no appeal from that decision not to grant vindicatory damages.

[202] The context of the decisions of the Privy Council in *Ramanoop* and in *Merson* appears to have also been misunderstood. Both of those cases arose from applications for redress made directly to the High Court under the provisions of the Constitution of Trinidad and Tobago, and the Supreme Court under the provisions of the Constitution of the Bahamas, respectively. Our Federal Constitution, unfortunately, does not confer upon the courts the same or similar jurisdiction and powers. E F

[203] Subsections 14(1) and (2) of the Constitution of Trinidad and Tobago read as follows: G

> 14(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.
>
> (2) The High Court shall have original jurisdiction — H
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (4), I
>
> and may, subject to subsection (3), make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

[204] The Privy Council in *Ramanoop* made it clear that the application in that case was brought before the High Court under the provisions of sub-ss 14(1) and (2) of the Constitution. It must be noted that sub-s 14(1) allows such application to be made 'without prejudice to any other action with respect to the same matter which is lawfully available'. Provisions equivalent to ss 7 and 8 of our CLA *are* available in Trinidad and Tobago under the Compensation for Injuries Act and s 27 of the Supreme Court of Judicature Act of that jurisdiction.

[205] The Constitution of the Bahamas contains, in para (1) of art 28 provisions similar to s 14 of the Constitution of Trinidad and Tobago. In *Merson*, the issue that came before the Privy Council was whether the award for infringement of Merson's constitutional rights could stand under the proviso to para (2) of art 28 as he was already awarded damages for tort. Paragraphs (1) and (2) of art 28 of the Constitution of the Bahamas read as follows:

> 28(1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being of is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction —
>
> (a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article;
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

[206] The Privy Council held that damages for breach of constitutional rights could be awarded under art 28.

[207] As our Federal Constitution does not have provisions similar to those utilised in *Ramanoop* and *Merson*, a claimant has to look elsewhere for redress. The only law available is the CLA with its limitations, including the bar in s 8 to the grant of exemplary damages.

[208] As mentioned in *Sambu Pernas*, had it not been for 'ss 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular s 7, his case

must stand and fall on the basis of these sections'. A

[209] Our answer to leave question (2) is therefore in the affirmative.

Leave question (3): For the purpose of an estate claim under s 8 of the Civil Law Act 1956 (Act 67), whether the acts that make up the tort of misfeasance in public office must be the acts that occurred before the death of the deceased. B

[210] It bears repeating that by s 8 of the CLA on the death of a person all causes of action subsisting against or vested in him survive against or for the benefit of his estate, except for certain causes of action. But for s 8, those causes of action would die with him. C

[211] Clearly therefore the causes of action that are saved by s 8 must be causes of action that existed prior death. Acts done or omitted to be done in relation to a person after his death cannot possibly give rise to any cause of action that could vest in him prior to his death. D

[212] The tort for misfeasance in public office is explained in the case of *Three Rivers District Council and others v Bank of England* [2000] 3 All ER 1; [2003] 2 AC 1; [2000] 2 WLR 1220. According to the House of Lords, the tort can arise under either or both of these circumstances: (1) where a public officer exercises his power in bad faith with the specific intention to injure the claimant; or (2) he exercises his power with reckless indifference about the consequences of such exercise. Lord Steyn in that case said: E F

> The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically *intended to injure a person or persons.* This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act *will probably injure the plaintiff.* It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful. (Emphasis added.) G

[213] What is also clear from the *Three Rivers* case is that misfeasance in public office is not the same as non-feasance in public office. Lord Millet explained: H

> ... It is no accident that the tort is misfeasance in public office, not non-feasance in public office. The failure to exercise a power is not in itself wrongful. It cannot be equated with acting in excess of power. The tort is concerned with preventing public officials from acting beyond their powers to the injury of the citizen, not with compelling them to exercise the powers they do have, particularly where they have a discretion whether to exercise them or not. I
>
> ...

A In conformity with the character of the tort, the failure to act must be deliberate, not negligent or arising from a misunderstanding of the legal position. In my opinion, a failure to act can amount to misfeasance in public office only where: (i) the circumstances are such that the discretion whether to act can only be exercised in one way so that there is effectively a duty to act; (ii) the official appreciates this but B nevertheless makes a conscious decision not to act; and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury would be the natural and probable consequence of his failure to act.

C **[214]** There must be a nexus between the intentional or reckless act and the injury suffered by the person affected by the act, such that the injury is a consequence of the intentional or reckless act.

D **[215]** In the context of an action under s 8 of the Civil Law Act, the malicious or reckless exercise of power by the public officer must have adversely affected the deceased person prior to his death for otherwise no cause of action could have vested in him such that the cause of action would *survive* his death.

[216] Our answer to leave question (3) is therefore in the affirmative.

E DECISION

Appeal No 36

F **[217]** A close scrutiny of the amended statement of claim in Appeal No 36 shows that it is a pure dependency claim under s 7 of the CLA. This is especially clear from paras 5 and 6.

G **[218]** Based on our analysis and our answer to leave question (1) above, we find that the Court of Appeal erred in ordering exemplary damages to be paid by the appellants. Such an award would still be contrary to law even if the action had been brought under s 8 of the CLA, as can be seen from our analysis and answer to leave question (2).

H **[219]** We therefore allow this appeal and set aside the order of the Court of Appeal with respect to exemplary damages.

Appeal No 52

I **[220]** As shown by what has been discussed above, the award of exemplary damages by the Court of Appeal is clearly contrary to the bar expressly set out in sub-s 8(2) of the CLA.

[221] With regard to damages for misfeasance in public office, the respondent relies on the various acts which form the basis for the claim for assault and battery and false imprisonment as well as for statutory breach of duty under the Police Act 1967 and on the alleged continuous and repeated attempts by the appellant to hide the cause of death of the deceased and the persons responsible, and the appellants' failure to inform the respondent of the location of the deceased after his arrest or to provide her with access to the deceased.

[222] In their judgment, the Court of Appeal had included the following acts and omissions as instances of misfeasance in public office in this case:

(a) the statements made by the first appellant (said to be based on information given by the third defendant) as to the cause of Kugan's death; and

(b) the lack of departmental inquiry or public inquiry.

[223] We are of the considered view, based on the *Three Rivers*' case, that the acts and omissions referred to above do not constitute misfeasance in public office.

[224] Learned senior federal counsel conceded that misfeasance in public office was committed in regard to the various acts which were done or omitted to be done by police officers before Kugan's death. Learned senior federal counsel submitted that the award of damages for misfeasance in public office should be reduced to RM50,000 to reflect only those acts.

[225] We therefore allow the appeal in part. The order of the Court of Appeal on exemplary damages is set aside.

[226] In view of the acts done or omitted to be done to Kugan which contributed to the cause of his death, we do not consider the amount of RM100,000 awarded as damages for misfeasance in public office to be inappropriate. We therefore affirm the amount so awarded.

Appeal No 53

[227] The respondent in this appeal brought this action under s 7 of the CLA as well as under art 5 of the Federal Constitution 'diatas kapasiti diri sendiri dan sebagai orang tanggungan dan/atau bagi pihak kesemua orang-orang tanggungan si mati'.

[228] As we have explained in answering leave question (4), general damages for pain and suffering *cannot* be awarded to a plaintiff in a dependency claim brought under s 7 of the CLA.

A **[229]** We therefore allow this appeal and set aside the award of general damages of RM100,000.

Appeal Nos 36, 53 and 52 allowed in part.

B Reported by Kohila Nesan

C

D

E

F

G

H

I